[HIGH COURT OF AUSTRALIA.]

PENFOLDS WINES PROPRIETARY LIMITED . . . . . } APPELLANT;
PLAINTIFF,

AND

JAMES PETER ELLIOTT . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *July* 29-31; *Nov.* 25.

Latham C.J. Starke, Dixon, McTiernan and Williams JJ.

*Trespass to Goods—Wine sold in bottles—Property in bottles retained by vintner—Use of bottles by purchasers to carry other wine—Participation in use by hotelkeeper — Conversion — Trespass — Bailment — Equitable relief — Injunction — Application by vintner against hotelkeeper—Trade usage—Systematic course of conduct—Remedy at common law.*

The appellant made wine and sold it in bottles the ownership of which it retained. The bottles were embossed with the appellant's name and an intimation that they were the property of the appellant. The respondent, an hotelkeeper, from time to time sold bulk wine to customers who provided bottles in which to carry it away. These bottles were filled by the respondent. Among these bottles were some embossed in the manner stated. The respondent did not take any step to inform himself whether the bottles so filled were or were not owned by the appellant. An application by the appellant for an injunction to restrain an alleged trespass to goods by the respondent was refused. Upon appeal,

*Held*, by *Starke*, *Dixon* and *McTiernan* JJ. (*Latham* C.J. and *Williams* J. dissenting), that the appeal should be dismissed.

By *Starke* and *McTiernan* JJ. on the ground that the evidence did not establish that the respondent was in any systematic way or to any substantial extent dealing with the appellant's bottles in a manner inconsistent with ownership, or that the respondent was handling the bottles of the appellant except rarely and casually, therefore an injunction should not be granted and the appellant should be left to its remedies at common law.

By *Dixon* J. on the ground that the facts proved did not disclose the commission by the respondent of any common law tort in respect of the appellant's property or possession thereof: accordingly there was no foundation for the injunction and the equitable relief sought by the appellant.

Decision of the Supreme Court of New South Wales (Full Court): *Penfolds Wines Pty. Ltd.* v. *Elliott*, (1946) 46 S.R. (N.S.W.) 217; 63 W.N. 103, by majority, affirmed.

(*a*) The effect of acts repugnant to a bailment and consequently operating as a determination of the bailment;

(*b*) The rule that, where there has been a trespass *de bonis* an action lies against the person committing the trespass not only at the suit of the person in possession, but also at the suit of the person immediately entitled to possession; and

(*c*) The supposed distinction between the consequences of the delivery by a bailee of possession of a chattel to a stranger and of the stranger's taking it out of his possession by his licence;

discussed.

APPEAL from the Supreme Court of New South Wales.

The principal relief claimed by Penfolds Wines Pty. Ltd. in a statement of claim brought by it in the equitable jurisdiction of the Supreme Court of New South Wales was an injunction to restrain James Peter Elliott, his servants and agents from collecting or disposing of, or parting with the possession of or in anywise dealing with or handling the plaintiff company's bottles except such of them as contained at the time wine or brandy put on the market and bottled by the company, and from placing any other liquor in any of the bottles.

The company carries on business as a vigneron and wine and spirit merchant in New South Wales and elsewhere. Elliott is a licensed victualler carrying on business at the Central Hotel, Singleton, New South Wales. The company owns large numbers of bottles and uses them in its business. In the course of its business the company sells large quantities of wine and brandy in bottles. The bottles are manufactured to the order of the company and, at least since 1922, each bottle bears a moulded device or embossment in the words "This bottle is the property of Penfolds Wines Ltd.", or the words "This bottle always remains the property of Penfolds Wines Ltd." It was proved that the company never sold bottles so branded or embossed, but had used them only for the purpose of delivering its wine or brandy to customers to be either retailed or consumed by their purchasers. When the company supplied wine or brandy to any persons (as it did to Elliott in 1942) in such bottles, an invoice

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was always delivered which referred to the brand and stated that bottles so branded " are not sold but remain the sole property of Penfolds Wines Limited from which company they have been loaned, and such bottles have been delivered by such company solely for the purposes of enabling the contents to be used once only for retailing, consuming or using Australian Wine or Brandy made, distilled or vended by this company and contained in such bottles. When the contents are once used, the bottles must be forthwith on demand handed or given over or returned to the said company or its agents. The bottles must not be destroyed or damaged or parted with, or must not be used for any but the foregoing purposes. N.B. It should be thoroughly understood that this will still allow for a bonus being paid for the prompt return of our branded bottles." A notification to this effect formed part of an advertisement of the Branded Bottle Association of New South Wales Ltd. which regularly appeared in the United Licensed Victuallers Association Review, the journal of the United Licensed Victuallers Association. The evidence showed that about forty companies and firms in New South Wales delivered bottles to persons who dealt with them on the same terms as those stated in the company's invoice. Elliott was a member of the United Licensed Victuallers Association and from time to time received the Review.

The company alleged that for some time past Elliott, without its consent, had been receiving, collecting and handling its branded bottles and using them in connection with his business and placing and delivering in those bottles to his customers liquids not manufactured and put on the market by the company. The company satisfied the trial judge (*Nicholas* C.J. in Eq.) that on 7th November 1944 Elliott filled two of the company's branded bottles (proved to have been manufactured not earlier than 1930), with wine other than the company's wine, and delivered them to one Spencer Claude Gascoyne Moon who was a paid employee of the Brand Protection Association with which the Branded Bottle Association of New South Wales Ltd., referred to above, was affiliated. Moon was also an inspector under the *Pure Food Act* 1908-1944 (N.S.W.). Although it was found that Elliott delivered the bottles to Moon in return for a sum of eight shillings the judge came to the conclusion that Elliott did not intend to sell the bottles to Moon. The company relied upon the transaction with Moon as involving an assumption on the part of Elliott of dominion over the bottles which amounted to a conversion; but it also relied upon the fact that Elliott used the bottles for a purpose inconsistent with the terms upon which the bottles were delivered to purchasers or other persons, namely, for

containing wine other than the company's wine. The judge accepted the evidence of Elliott that the two bottles delivered to Moon were brought to Elliott by Elliott's brother to be filled with wine other than the company's wine and that they were so filled. Elliott admitted in evidence that he had " for years " and on a subsequent occasion followed the same practice of filling branded bottles with wine other than the company's wine and delivering them in the way of trade to his brother. Apart from the subject transaction Elliott stated that his sales of wine in bottles as distinct from sales in glasses in the bar were of two kinds. The more expensive wine was sold in sealed bottles, the less expensive wine was sold in bottles supplied by the customer either on the day he obtained the wine or some days earlier, the wine in each instance being syphoned from a barrel. Elliott stated that he sometimes bought bottles from boys who collected them from residents of Singleton and sometimes took them from residents who wished to get rid of them. Sometimes he disposed of surplus bottles to a merchant in Newcastle. He said that on his view of the legal position he was entitled to fill a bottle brought to him by a customer with any wine to be purchased by that customer, but that he was not entitled to fill a branded bottle with wine for a customer who had not brought that bottle to be filled. Elliott admitted that he knew the means adopted by the company for asserting its ownership of the bottles. He did not admit, and the judge did not believe, that he necessarily saw the brand embossed on the bottle when he handled one of the company's bottles or that he knew that the bottles handed to Moon bore the company's brands. Elliott's brother gave evidence as to the manner in which he obtained wine from Elliott, usually two gallons at a time. He said he left bottles to be filled as wine became available. Elliott admitted that the distinction between branded and unbranded bottles was well-known in the trade, that he had known it for years, that he knew that there was a restriction upon the use of branded bottles and that he considered that he complied with all the requirements of the restriction when he abstained from selling branded bottles and only filled them with wine when brought to him by his brother or some other customers. He admitted that he would fill a bottle, even though he knew that it was the company's bottle. The judge was not satisfied, however, that Elliott did not supply wine in bottles other than those which the customers had brought to him, or that he obtained only unbranded bottles from the persons, boys or householders who brought them to him. But there was no finding that he did not so supply wine. It seemed clear that there were full bottles in Elliott's storeroom, and that these full bottles included some

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that bore the company's brand. The judge pointed out that there was no contractual relation between the company and Elliott. Elliott did not obtain from the company the two bottles as to which precise evidence was given. Further, the case was not one of passing-off, though wine other than the company's wine was in fact put into the company's bottles; nor was the claim of the company a claim in detinue because there was no complaint that Elliott had refused to return the bottles upon demand or allow the company to take them. The judge accepted the position that there was a trespass to chattels but held that " in the absence of any intention by " Elliott " to make a business of selling the bottles or to refuse to return them if called upon to do so " an injunction should not be granted. The judge said it was not suggested that Elliott made a business of dealing in or selling bottles, nor could it be said against Elliott that he acted systematically and intentionally in collecting or disposing of the company's bottles and would, if not prevented, continue to do so in the future.

No question of usage or of estoppel based upon usage was raised upon the trial, either by the pleadings or by evidence.

Upon an appeal by the company to the Full Court of the Supreme Court (*Jordan* C.J., *Street* and *Roper* JJ.) it was held that there was evidence of trespass to the company's goods by Elliott and some likelihood of further trespass. But the Court was of opinion that the company should be left to its common law remedies and that the case was not one for an injunction: *Penfolds Wines Pty. Ltd.* v. *Elliott* (1).

From that decision the company, by leave, appealed to the High Court.

Other facts appear in the judgments hereunder.

*Barwick* K.C. (with him *Henry* and *Benjamin*), for the appellant.

*Kitto* K.C. (with him *Emerton*), for the respondent.

*Cur. adv. vult.*

Nov. 15. The following written judgments were delivered:—

LATHAM C.J. The appellant company carries on business as a vigneron and wine and spirit merchant in New South Wales and elsewhere. The respondent, Elliott, is a licensed victualler carrying on business at a hotel at Singleton, New South Wales. The company uses large numbers of bottles in its business. All bottles used in

(1) (1946) 46 S.R. (N.S.W.) 217; 63 W.N. 103.

New South Wales have, at least since 1922, borne upon them in raised letters moulded upon the glass the words " This bottle is the property of Penfolds Wines Limited " or " This bottle always remains the property of Penfolds Wines Limited." It was proved that the company never sold bottles so branded, but only the contents of the bottles. When it supplied wine &c. to any persons (as it did to the defendant in 1942) in such bottles an invoice was always delivered which referred to the brand and stated that bottles so branded " are not sold, but remain the sole property of Penfolds Wines Limited, from which Company they have been loaned, and such bottles have been delivered by such Company solely for purposes of enabling the contents to be used once only for retailing, consuming or using Australian Wine or Brandy made, distilled or vended by this Company and contained in such bottles. When the contents are once used, the bottles must be forthwith on demand handed or given over or returned to the said Company or its agents. The bottles must not be destroyed or damaged or parted with, or must not be used for any but the foregoing purposes. N.B. It should be thoroughly understood that this will still allow for a bonus being paid for the prompt return of our branded bottles." The plaintiff alleged that the defendant without its consent had been receiving, collecting and handling branded bottles and using them in connection with his business and placing and delivering in those bottles to his customers liquids not manufactured and put upon the market by the plaintiff company. The plaintiff claimed an injunction against the continuance of this practice.

The plaintiff satisfied the learned trial judge (*Nicholas* C.J. in Eq.) that the defendant filled two of the plaintiff's branded bottles (proved to have been manufactured not earlier than 1930) with wine other than Penfold's wine, and delivered them to one Moon, who was a paid employee of the Brand Protection Association with which the Branded Bottle Association of New South Wales Ltd. was " affiliated." Moon also had authority to act as an honorary pure foods inspector. It was not found by the learned judge that the defendant actually sold the bottles to Moon, though it was found that the defendant delivered them to Moon in return for a sum of eight shillings. The plaintiff relies upon the transaction with Moon as involving an assumption of dominion over the bottles which amounts to a conversion ; but the plaintiff also relies upon the fact that the defendant used the bottles for a purpose inconsistent with the terms upon which the bottles were delivered to purchasers or other persons, namely for containing wine other than Penfold's. The learned judge accepted the evidence of the defendant that the two bottles delivered

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to Moon were brought to the defendant by his brother to be filled with wine other than Penfold's and that they were so filled.

The defendant admitted in his evidence that he had " for years " and on a subsequent occasion followed the same practice of filling branded bottles with wine other than Penfold's and delivering them in the way of trade to his brother. He admitted that he knew that some bottles were branded and that others were unbranded, and he said that he would not purport to sell a branded bottle, but that if a man brought his own bottle to be filled he did not have to worry about the brand, and that he considered that he was entitled, if a customer brought a bottle to him, to fill a branded bottle " with anything." He admitted that he would fill a bottle, even though he knew that it was Penfold's bottle. The learned judge was not satisfied that the defendant did not also put wine into branded bottles other than those which his brother and certain other customers brought to him. But there was no finding that he did so supply wine.

The learned trial judge pointed out that there was no contractual relation between Penfolds and the defendant. The defendant did not obtain from the plaintiff the two bottles as to which precise evidence was given. Further, the case was not one of passing off, though wine other than Penfold's was in fact put in Penfold's bottle, nor was the claim of the plaintiff a claim in detinue because there was no complaint that the defendant had refused to return the bottles upon demand or to allow the plaintiff to take them. The learned trial judge dealt in some detail with the case of *William Leitch & Co. Ltd.* v. *Leydon* (1), upon which the defendant relied. That case arose under Scotch law, and it was held that where the plaintiff's claim was that the defendant filled bottles belonging to the plaintiff embossed with the plaintiff's name but not with any statement that they remained the property of the plaintiff, the plaintiff was not entitled to an injunction restraining such use, because there was no duty resting upon the defendant to examine bottles to ascertain whether they were the appellant's property or not, and under Scotch law, in the absence of knowledge on the part of the defendant that the bottles were the property of the plaintiff, no wrong was done to the plaintiff. Viscount *Dunedin* said " trespass as to a chattel in a Scotch lawyer's mouth is a perfectly unmeaning phrase " (2). It is not an unmeaning phrase in English law. In the present case the plaintiff does not make any claim based upon any supposed duty to examine bottles. He relies upon the law that any person interferes with the chattels of another person at his risk. The learned trial judge accepted the

(1) (1931) A.C. 90.

(2) (1931) A.C., at p. 103.

position that there was a trespass to chattels but held that " in the absence of any evidence of intent by the defendant to make a business of selling the bottles or to refuse to return them if called upon to do so " it was not a case for an injunction.

Upon appeal to the Full Court it was held that there was evidence of trespass to the plaintiff's goods by the defendant and some likelihood of further trespass. But the Court was of opinion that the plaintiff should be left to its common law rights, and that the case was not one for an injunction. This conclusion was reached upon the ground that there was a usage for commodities to be sold in containers upon terms that the container was sold as well as the commodity, that this usage was so notorious that any person who sold goods in a container was estopped from denying that the transaction was subject to the usage unless he brought home to the person who was charged with wrongful use of the container the knowledge that in accordance with the usage the container had not been disposed of. Upon this ground it was held that the plaintiff was estopped from relying upon its right to the possession of the bottles as against the defendant who, at least in the absence of proof that he had examined the bottles, was entitled to suppose that they had been sold when the contents were sold. The Full Court was of opinion that the evidence did not establish that the defendant was in any systematic way or to any substantial extent dealing with the plaintiff company's bottles.

No question of usage or of estoppel based upon usage was raised upon the trial, either by the pleadings or by evidence. There was no evidence of any such usage. Apparently the existence of such a usage was never suggested upon the trial, or, this Court was informed, in argument upon the appeal. There was evidence that about forty companies and firms in New South Wales delivered bottles to persons who dealt with them on the same terms as those stated in the invoice of the plaintiff which has already been quoted. The practice of these traders not selling branded bottles with their contents was regularly advertised in the Licensed Victuallers' Association Review. The defendant was a member of the Association and took the Review. Reference to the case of *Curtis* v. *Perth and Fremantle Bottle Exchange Co. Ltd.* (1), decided in 1914, shows that a similar practice was in operation in West Australia in that year, and *Model Dairy Pty. Ltd.* v. *White* (2) is a Victorian example of the same practice in the case of milk bottles. Other cases depending upon the branding of bottles with notices similar to those proved in this case have from time to time in recent years come before the courts. I

(1) (1914) 18 C.L.R. 17.

(2) (1935) 41 A.L.R. 432.

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should have thought that it was notorious that this practice had spread and had become established in relation to tremendous numbers of bottles in New South Wales and elsewhere in Australia.

The requirements of an estoppel *in pais* are stated by *Birkenhead* L.C. in *Maclaine* v. *Gatty* (1) in the following words: "Where A has by his words or conduct justified B in believing that a certain state of facts exists, and B has acted upon such belief to his prejudice, A is not permitted to affirm against B that a different state of facts existed at the same time."

The defendant did not seek to establish by evidence that the plaintiff did anything to lead him to believe that the plaintiff had sold the bottles as well as their contents, or that he in fact believed that the plaintiff had done so, or that he acted upon any such belief. In fact the defendant admitted that the distinction between branded and unbranded bottles was well known in the trade (the latter being known by the significant name of "clean skins"), that he had known it for years, that he knew that there was a restriction upon the use of branded bottles and that he considered that he complied with all the requirements of the restriction when he abstained from selling branded bottles and only filled them with wine when brought to him by his brother and some other customers—a course which he deliberately followed because of his knowledge of the restriction. Thus not only were none of the requirements of an estoppel established, but the evidence is inconsistent with the now suggested estoppel. In my opinion there is no justification for making a case for the defendant upon appeal which he did not seek to make upon the trial, against which evidence could have been directed if it had then been sought to make such a case for him, and which the evidence which was given happens to displace.

The case for the defendant based upon usage and estoppel, if established, should, in my opinion, result in a decision that the plaintiff was estopped from alleging the commission of any tort and that the suit should be dismissed on that ground. It would then be unnecessary to consider whether relief by way of injunction should be refused on the ground that, though a tort was proved, it was rare and casual. But the Full Court did in fact decide the case upon the latter ground. I deal with this aspect of the case before proceeding to consider the new case which the defendant has made in this Court.

The evidence shows that the terms upon which the plaintiff delivered branded bottles to other persons were that only the contents of the bottle and not the bottle itself were sold or otherwise disposed of: *Griffith* C.J. said in *Curtis* v. *Perth and Fremantle Bottle Exchange Co. Ltd.* (2): "There is no reason that I know of why persons

(1) (1921) 1 A.C. 376, at p. 386. (2) (1914) 18 C.L.R., at p. 22.

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 branded bottles of the plaintiff were bailed to the persons who received them. By the terms of the bailment the bailee was not entitled to use the bottles for any other purpose than once only for retailing, consuming or using the plaintiff's wine contained in the bottles, and he had no right to authorize any other person to use them for any other purpose.

As the case came to this Court the position was that the defendant had not contended that he had not committed a trespass as against the plaintiff. It was held that he had committed a trespass, but the plaintiff failed to obtain an injunction on the ground that the evidence showed only a rare and casual act. In my opinion the evidence shows that the plaintiff company owns many thousands of branded bottles. The common law remedy for refusal to return one bottle or for breaking or dirtying one bottle would be quite ineffective to protect the plaintiff's rights in this valuable property. The defendant doubtless finds it much cheaper to use other people's bottles than to buy bottles of his own. It was proved that he had made a practice of filling branded bottles without paying any attention to the notice given by the brand, that he had continued the practice after the particular occasion of the disposition of the wine to Moon, and that he considered that he had a right to continue it. In *Beswicke* v. *Alner* (1), the Full Court of Victoria held that " where the plaintiff has established the invasion of a common law right, and there is ground for believing that without an injunction there is likely to be a repetition of the wrong, he is, in the absence of special circumstances, entitled to an injunction against such repetition " (2). It was also there held that the fact that the actual damage proved up to the beginning of the action is small or negligible does not constitute such special circumstances. I refer to what was said by *Gavan Duffy* J. in *Model Dairy Pty. Ltd.* v. *White* (3) in a case where the plaintiff sued for conversion upon the ground that the defendant without authority used bottles belonging to the plaintiff :—" Branded bottles as they are used in the milk trade are a continuous invitation to dishonest use. The number of separate cases of conversion in a year might be very large, and the evidence suggests that if the defendant is unrestrained they will be considerable. The difficulties of detection

(1) (1926) V.L.R. 72.
(2) (1926) V.L.R., at pp. 76, 77.
(3) (1935) 41 A.L.R., at p. 434.

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are great. It is very unlikely that evidence can be collected in a large enough number of instances to make proceedings for damages anything but a useless remedy, and misuse of a dairyman's bottles on an extensive scale may interfere seriously with his buying arrangements. To force the plaintiff to depend on actions for damages in individual cases would be to deprive him of all real protection."

In my opinion these observations as to the inadequacy of a common law remedy are very relevant in the present case. In my opinion, upon the case as dealt with in the Supreme Court, an injunction should be granted.

In this Court, however, the defendant has sought to make still another case—not a case admitting a wrong, but disputing the propriety, in all the circumstances, of relief by way of injunction (as before *Nicholas* C.J. in Eq.) and not a case based upon usage and estoppel (as developed by the Full Court), but a case denying the commission of any tort. The argument for the defendant was directed against the view adopted in the Supreme Court that there was a trespass by the defendant to the plaintiff's goods when he filled the plaintiff's bottles with wine other than Penfold's. It was pointed out that the defendant obtained the branded bottles from his brother and other customers with their consent. He did not violate their possession in any way. He had their authority to use the bottles as he did in fact use them. It was therefore argued that, there being no trespass as against the brother and other customers, there was no trespass for which the plaintiff could sue, even if the plaintiff by reason of the determination of the original bailment had a right to immediate possession of the bottles.

A bailment is determined by any act of the bailee which is wholly repugnant to the holding as bailee, and thereupon the bailor has an immediate right to possession (*Donald* v. *Suckling* (1); *Whiteley Ltd.* v. *Hilt* (2); *Bullen & Leake's Precedents of Pleadings*, 3rd ed. (1868), pp. 291, 292). In this case the delivery of the bottles to the defendant by his brother for the purpose of having them filled with wine other than Penfold's was repugnant to the express terms of the bailment. The bailment having been determined, the plaintiff as bailor had an immediate right to the possession of the bottles.

A mere taking or asportation of a chattel may be a trespass without the infliction of any material damage. The handling of a chattel without authority is a trespass: *Clerk & Lindsell* on *Torts*, 8th ed. (1929), pp. 213, 214; *Pollock* on *Torts*, 14th ed. (1939), p. 280. Unauthorized user of goods is a trespass; unauthorized acts of riding a horse, driving a motor car, using a bottle, are all equally trespasses,

(1) (1866) L.R. 1 Q.B. 585, at p. 615. (2) (1918) 2 K.B. 808, at p. 819.

even though the horse may be returned unharmed or the motor car unwrecked or the bottle unbroken. The normal use of a bottle is as a container, and the use of it for this purpose is a trespass if, as in this case, it is not authorized by a person in possession or entitled to immediate possession.

It is argued, however, that, as the defendant obtained the two bottles from his brother, who had actual possession of them, and used them with his authority, there was no trespass as against either the brother or the plaintiff. Plainly there was no trespass as against the brother. Does this fact conclusively show that there was no trespass as against the plaintiff? See *Clerk & Lindsell* on *Torts*, 8th ed. (1929), pp. 213, 214:—"It is apprehended, however, that for a taking to constitute a trespass it must not merely be an unlawful act, but unlawful as against the party from whom possession is taken. Thus, if goods belong to A, and B being unlawfully possessed of them transfers them to C, the taking of them by C, though it may give a good cause of action in trover, is not a trespass. And it makes no difference, it would seem, if C is aware of the infirmity of B's title. The receiver of stolen goods does not commit a trespass when he takes the goods from the thief with the thief's consent. If it were otherwise every receiver might be indicted for larceny."

The same opinion is expressed in *Pollock & Wright* on *Possession in the Common Law*, 1st ed. (1888), where Mr. Justice *Wright* reaches the conclusion that trespass is always an interference with actual possession. If this is the case, the use by the defendant of the plaintiff's bottle for keeping and disposing of wine in his trade (being an act done with the consent of the person who delivered the bottle to him, such person having the actual possession of the bottle) was not a trespass for which any person can sue. In the work cited at p. 145 (after a reference to a contrary view expressed in *Williams Saunders* and other authorities) the following opinion is stated:—"It is submitted that the correct view is that right to possession, as a title for maintaining trespass, is merely a right in one person to sue for a trespass done to another's possession; that this right exists whenever the person whose actual possession was violated held as servant, agent, or bailee under a revocable bailment for or under or on behalf of the person having the right to possession; and that it does not exist for the purposes of trespass and theft, as distinguished from trover and detinue, when the person whose possession was violated was not in any way a delegate or representative of the person having the right to possession, nor when the thing was not in any possession at all."

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With all respect, I have difficulty in understanding how it can accurately be said that one person can have a right to sue for a trespass done to another's possession—unless that possession is regarded as being the possession of the plaintiff—and then it is not, in any relevant sense, " another's possession."

The possession of a servant or agent is the possession of the master or principal (as is stated at p. 138) who therefore is regarded as having actual possession and not only a right to possession: See also *Pollock* on *Torts*, 14th ed. (1939), p. 275. In the other case mentioned, namely that of a revocable bailment, the bailor has neither possession nor a present right to possession so long as the bailment remains unrevoked. If the possession of a bailee holding under such a bailment is violated it is his possession, and not the possession of his bailor, which is violated. In this case, therefore, the admission that the bailor may sue for trespass depends, as already stated, upon allowing one person A to sue for a wrong done to another person B, who is not the servant or agent or in any other way representative of A. The result is that upon this view A may sue for a wrong though no wrong has been done to him.

The contention for the defendant is that a right to immediate possession, as distinct from actual possession, can never entitle any plaintiff to sue in trespass unless there is an interference with the actual possession of some other person falling within the limited class referred to in the extract which I have quoted.

The law is frequently stated, however, in terms which do not recognize the limitation or qualification developed by Mr. Justice *Wright*: See *Johnson* v. *Diprose* (1), per *Bowen* L.J.—" A person who brings an action for trespass to goods must either be in possession of them at the time of the alleged trespass or entitled to the immediate possession." The law is stated in the same terms in *Bullen & Leake's Precedents of Pleadings*, 3rd ed. (1868), p. 414; *Halsbury's Laws of England*, 2nd ed., vol. 33, p. 23. In *Jenks, Digest of English Civil Law*, 1st ed. (1908), Book II., Part III., articles 854 *et seq.*, the law is stated in the following terms :—

" 854. Trespass to goods is any direct infringement of the possession by another of corporeal personal chattels by means of an asportation or other physical invasion; whether such infringement is or is not intentional.

855. Subject to the exceptions mentioned in " sections 858 *et al.* " the plaintiff, in an action for trespass to goods, must prove that he had actual possession of the goods at the time when the defendant interfered with them."

(1) (1893) 1 Q.B. 512, at p. 516.

Article 858 states one of the exceptions in the following terms :— " A bailor of goods has sufficient possession to support an action for trespass against third persons [*Lotan* v. *Cross* (1) ; *White* v. *Morris* (2) ; *Johnson* v. *Diprose* (3) ] unless an exclusive possession of the goods for a period not yet expired has been granted by him to the bailee [*Ward* v. *Macauley* (4) ; *Gordon* v. *Harper* (5) ]."

In the present case the period of the bailment had expired—the bailment was determined when the person who brought the bottles to the defendant, having used them once for containing &c. the plaintiff's wine, procured the defendant to use them to contain wine other than the plaintiff's wine and therefore in a manner absolutely repugnant to the terms of the bailment. (Either the bailment was then determined or it was not determined. It either existed or it did not exist. It could not, I venture to submit, exist for purposes of trover and detinue and not exist for purposes of trespass and theft, as stated or suggested in *Pollock & Wright*, pp. 132, 133.) The plaintiff then became legally entitled to immediate possession of the bottles. The authorities to which I have referred support the view that the plaintiff could therefore sue in trespass, though I agree that logical argument tends against this view.

It is contended, however, that if there was no trespass by the defendant in receiving and taking possession of the bottles from his brother there could be no conversion in the subsequent use which he made of the bottles. I assume (and I think rightly) in favour of the defendant that his brother, who obtained the bottles from a retailer of the plaintiff's wines, was a sub-bailee of the bottles with the same rights as against the plaintiff as the original bailee (the retailer) including a right to use the bottles for the purpose of once using &c. the wine made by the plaintiff contained in the bottles, but not including any right to use the bottles for other wine or to deliver them to any person other than the plaintiff. If the defendant's brother is regarded as being a sub-bailee holding the bottles upon the same terms as the original bailee, his delivery of the bottles to the defendant to be filled with wine other than the plaintiff's wine and to be returned to him was an act which, to use the words of Baron *Parke* in *Fenn* v. *Bittleston* (6), was " doing a thing entirely inconsistent with the terms of the bailment, though not amounting to a destruction of the chattel." It was therefore " a determination of the lawful bailment, and caused the possessory title to revert to the

(1) (1810) 2 Camp. 464 [170 E.R. 1219].
(2) (1852) 11 C.B. 1015 [138 E.R. 778].
(3) (1893) 1 Q.B. at p. 515.
(4) (1791) 4 T.R. 409 [100 E.R. 1135].
(5) (1796) 7 T.R. 9 [101 E.R. 828].
(6) (1851) 7 Ex. 152, at p. 159 [155 E.R. 895, at p. 899].

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bailor, and entitled him to maintain an action of trover." As in *Fenn* v. *Bittleston* (1), so in this case, the contract between the bailor and the bailee was never meant to authorize the bailee " to do more than use the chattels and not to give the use to a third person." In that case a transfer of the property to a stranger " was unquestionably wrong and it operated as a disclaimer of tenancy at common law." In the present case the terms of the bailment expressly prohibited the use of the bottles for purposes other than those expressed, and the transfer of the possession of the bottles for such a purpose was a prohibited act: it was unquestionably wrong and determined the bailment, and therefore would have entitled the plaintiff to sue the defendant's brother in trover.

But the defendant's brother was not in fact an original bailee and was not in contractual relations with the plaintiff. Does this fact place him in any better position as against the plaintiff (the original bailor) than that in which the original bailee would have been? Could he lawfully continue to use the bottles as he pleased until possession of them was demanded by the plaintiff? Could the defendant also lawfully continue to use the bottles as he pleased until such a demand was made upon him? In my opinion the answer to these questions should be in the negative for the following reasons. Upon the assumption that the defendant's brother was lawfully in possession of the bottles as a sub-bailee, and upon the basis of the fact that the defendant came into possession of the bottles with the consent of his brother, it is still the case that the original bailment was determined when the defendant's brother delivered the bottles to the defendant to use for purposes absolutely inconsistent with the terms of the bailment, upon which alone he held them. The defendant then used them without any regard to the plaintiff's rights. A taking of the bottles without any intention to exercise permanent or temporary dominion over them, though it might be a trespass, would not be a conversion; but the actual use of the bottles for the benefit of the defendant and his brother was a conversion: see *Fouldes* v. *Willoughby* (2), per Lord *Abinger* C.B. The defendant in the present case handled and used the plaintiff's bottles for the purpose of exercising what he regarded as his right to use them for containing any liquid that he chose to put into them and to keep them for that purpose until he delivered them, with their contents, to his customers—his brother or other persons who brought branded bottles to him: See *Pollock* on *Torts*, 14th ed. (1939), p. 286: " The grievance [in conversion] is the unauthorized assumption of the powers

(1) (1851) 7 Ex. 152 [155 E.R. 895].

(2) (1841) 8 M. & W. 540, at p. 546 [151 E.R. 1153, at pp. 1155, 1156].

of the true owner. Actually dealing with another's goods as owner, for however short a time and however limited a purpose, is therefore conversion." The defendant dealt with the bottles on the basis that he was entitled to hold them when brought to him by his brother or other customers and to use them for the purposes of his trade. In *Burroughes* v. *Bayne* (1), quoted by Sir *William Holdsworth* in *History of English Law*, vol. 7, p. 415, *Channell* B. said :—" Every asportation is not a conversion ; and therefore it seems to me that every detention cannot be a conversion. If it were, the mere removal of a chattel, independently of any claim over it in favour of the party himself, or anyone else whatever, would be a conversion. The asportation of a chattel for the use of the defendant or third persons, amounts to a conversion, and for this reason, whatever act is done inconsistent with the dominion of the owner of a chattel, at all times and places over that chattel, is a conversion."

In the present case there was not, in my opinion, a mere removal of the bottles received from the defendant's brother independently of any claim over them in favour of the defendant or anyone else. There was a handling of the bottles, an actual user of them, for the purposes of the defendant's trade—for containing and disposing of the defendant's wine and for the use of the defendant's customer, his brother. Such dealing with the bottles, under a claim of right so to deal with them (a claim in which the defendant still persists) was inconsistent with the dominion of the owner of the bottles and was a conversion.

But, further, the defendant treated the bottles as his own when he handed them over to Moon and received eight shillings for them. *Nicholas* C.J. in Eq. found there was not a sale on the ground that he was of opinion that the defendant considered that Moon was entitled to take them as a pure foods inspector. If the defendant had disclaimed any control in respect of the bottles, and had in effect said to Moon—" You as a pure foods inspector can do whatever you are entitled to do, but I disclaim any right to deal with these bottles," the case would have been very different. But the admitted facts show that the defendant delivered the bottles to Moon in return for eight shillings, a sum which he evidently kept for himself. He dealt with the bottles (as well as with their contents) as being a person entitled to dispose of them to Moon, that is as owner, and I can see no reason for holding that such a disposition was not a conversion of the bottles.

Thus in my opinion it was shown that the defendant had committed the tort of conversion in respect of two chattels belonging to

(1) (1860) 5 H. & N. 296, at pp. 305, 306 [157 E.R. 1196, at p. 1200].

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the plaintiff. For reasons already stated, a remedy at common law is inadequate. To leave the plaintiff to its common law rights in the present case would be in effect to deprive the plaintiff of any remedy. The defendant claims the right to use the plaintiff's bottles as he thinks proper without troubling whether they belong to the plaintiff or not. The plaintiff does not put its case upon any duty of the defendant to examine the bottles, but simply upon the basis that the defendant has no authority to use the bottles as he has done in the past and as he proposes to continue to do in the future. In my opinion, therefore, the appeal should be allowed and an order should be made that the defendant, his servants and agents, be restrained from in any manner without the consent of the plaintiff using any bottles of the plaintiff with the words " This bottle is the property of Penfolds Wines Limited " or the words " This bottle always remains the property of Penfolds Wines Limited " moulded or embossed thereon for any purpose other than that of containing liquid manufactured by and placed therein by the plaintiff.

STARKE J. The appellant company is a vigneron and wine and spirit merchant and is the owner of a large number of bottles specially manufactured to its order on which are moulded or embossed the words " This bottle is the property of Penfolds Wines Ltd." or " This bottle always remains the property of Penfolds Wines Ltd." It does not sell or part with its property in the bottles but in the course of its business sells its wine and brandy in these bottles but upon condition that the bottles may not be destroyed or damaged or parted with or used for any purpose other than for retailing, consuming or using the contents of such bottles.

The respondent is a licensee of the Central Hotel, Singleton, in the State of New South Wales.

The appellant alleged that the defendant without the consent of the appellant was receiving, collecting and handling the appellant's bottles with the words already mentioned moulded or embossed thereon and using the bottles in connection with his business and placing therein and delivering to his customers liquids not manufactured or put upon the market by the appellant and also that the respondent had in his possession or under his control a large number of the appellant's bottles emptied of the appellant's wine and brandy which were either empty or contained liquids placed therein by the respondent and not manufactured or put upon the market by the appellant.

These allegations were not proved. But it appeared that the respondent had in his store room a barrel of wine with a number of

bottles collected together. Some were full of wine which it was stated was " Tulloch's " wine and corked, and others were lying on the floor washed but empty. Two of the full bottles had the appellant's name moulded or embossed thereon in the manner already mentioned and of the bottles lying empty on the floor one bore the name of the appellant embossed thereon. The respondent sold and delivered the wine in the two bottles or the two bottles filled with wine moulded and embossed with the name of the appellant company to a person who was an employee of the Brand Protection Association but who had obtained some authority from the Board of Health to enter and inspect any house, premises or building, not apparently for the purposes of the Board but in order to promote the interests of the Brand Protection Association of which the appellant was a member.

The trial judge was satisfied that the respondent sold wine in bottles to selected customers who brought bottles to him. He was not satisfied that the respondent did not supply wine in bottles other than those which the customers brought to him or that he obtained only unbranded bottles from persons who brought them to him. But there was no evidence relating to the appellant's bottles other than that relating to the three bottles already mentioned. The action was dismissed and that decision was affirmed by the Supreme Court of New South Wales in Full Court.

Now it was said for the respondent in this Court, though not, I rather think, in the Supreme Court, that the respondent was not guilty of a violation of any right of the appellant and the niceties of the common law actions of detinue, conversion, trespass and trespass on the case were expounded both from the Bench and the Bar. My brother *Dixon* has stated with much care the distinction between these forms of action and what must be proved to support each of them. That statement accords, I think, with the common law and also with informed opinion upon the subject. And with that statement I desire to associate myself. A recent statement of the law may be found in Professor *Winfield's Textbook of the Law of Tort*, 2nd ed. (1943), pp. 374, 376-386 ; See also *The History of Trover* by *J. B. Ames, Select Essays in Anglo-American Legal History*, vol. 3, p. 417, at p. 422 *et seq.* ; *The History of Trover, Harvard Law Review*, vol. XI., pp. 277-289, 374-386, and *Holmes, The Common Law*, 1st ed. (1882), pp. 171-175. In this case, however, I am content to assume in favour of the appellant that the evidence supports a conversion of two at least of the appellant's bottles. But to adopt the language of the learned Chief Justice of the Supreme Court the evidence does not establish that the respondent was in any systematic

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way or to any substantial extent dealing with the appellant's bottles in a manner inconsistent with its ownership, or that the respondent was handling the bottles of the appellant except rarely and casually. In the circumstances, said the Chief Justice, this is not a proper case for an injunction and the plaintiff should be left to any remedies which may be available to it at common law (See *Shelfer* v. *City of London Electric Lighting Co.* (1); *Fishenden* v. *Higgs & Hill Ltd.* (2); *Leeds Industrial Co-operative Society Ltd.* v. *Slack* (3)).

Leave to appeal should not, I think, have been granted by this Court in the present case but having been granted the appeal brought pursuant to that leave should be dismissed.

DIXON J. The injunction and ancillary equitable relief which the appellants seek against the respondent are founded upon the alleged commission by the respondent of wrongs to the appellants' rights of property and possession in and to personal chattels, namely bottles, and upon the apprehended repetition of such wrongs.

The appellants make wine and sell it in bottles the ownership of which the appellants retain. They are careful never to part with the property in the bottles containing the wine they sell. They have adopted a form of invoice by which the customer who buys wine from them in bottles is informed that the bottles remain the property of the appellants and are only lent, that the purpose of their delivery is solely to enable the retailing, use and consumption of the contents, and that thereafter the bottles must forthwith on demand be handed, or given over or returned to the appellants or their agents and must not be destroyed, damaged or parted with or used for any other purpose. The bottles are branded with statements that they are, or always remain, the property of the appellants.

The respondent is an hotelkeeper who, I have no doubt, has been aware of all this. Other makers of wines, of spirits and of beverages have followed the like course and an hotelkeeper knows the difference between bottles branded as the property of the vendor of the contents and clear or clean bottles. He knows, I am sure, that, in the case of the former, the contents only were sold when the original vendor parted with the bottles and that, in the case of the latter, the bottle and its contents were sold.

The appellants, as plaintiffs in the suit, set out to show that in his business of an hotelkeeper the respondent had been practising the collection of their bottles and the use of them for the sale therein to his customers of other wines and liquids. They failed, however, to

(1) (1895) 1 Ch. 287.
(2) (1935) 153 L.T. 128.
(3) (1924) A.C. 851.

establish that the respondent had pursued such a course of conduct. The facts, of which, in the result, the appellants succeeded in satisfying *Nicholas* C.J. in Eq., who tried the suit, possess a very different legal significance. They do not, in my opinion, disclose the commission of any common law tort to property or possession.

It appeared that the respondent was accustomed to sell bulk wine in small quantities to a few customers who brought their own containers or receptacles. Among the customers was a brother of the respondent. They commonly brought empty bottles, and sometimes they left them to be filled, calling for them at some later time or on some later day. The respondent filled the bottles and returned them. Some of the bottles thus brought, filled and taken away were not clear or clean, but bore brands of one or another of the suppliers of liquor who adopted the course of never parting with the property in their bottles.

The learned judge was not affirmatively satisfied that the respondent always returned to a customer the same identical bottle as he had left. But he made no finding that the respondent did not do so and there was no evidence that any of the appellants' bottles had been left by one man and returned to another.

What occasioned the proceedings was a visit to the respondent's hotel by an authorized inspector under the *Pure Food Act* 1908-1944 (N.S.W.), an inspector who was also an employee of an association of persons who, like the appellants, were interested in the protection of the property in branded bottles. He was accompanied by an officer of the Commonwealth Department of Customs. These officers concerned themselves in inquiries into matters affecting adulteration and matters affecting excise respectively, and then the former looked for branded bottles. He obtained in a storeroom two bearing the appellants' brands but filled with wine from another source. He took the bottles and paid for them an amount which, in response to an inquiry, the respondent named as the price of the wine.

There was a conflict as to whether this was a voluntary sale or a taking or surrender as in pursuance of the *Pure Food Act*. *Nicholas* C.J. in Eq. said that, on the evidence before him, he had come to the conclusion that the respondent did not intend to sell the bottles to either of the officers; that the respondent might well have considered that the inspector was taking what he was empowered to take and might not have known that, in such a case, the officer ought to have stated his intention to submit the wine to analysis and to have divided the samples. His Honour found against a sale, and, in my opinion, we are not in a position to disturb that finding.

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The respondent gave an explanation of the two refilled bottles belonging to the appellants. He explained that, with some other bottles, they had been left by his brother to be filled with bulk wine and, having been so filled, were waiting to be called for by his brother. The latter had originally obtained the bottles when he had bought some of the appellants' wine elsewhere. In general, it is true that to explain is to arouse scepticism and it is true that the respondent's explanation contains nothing entitling it to exemption from the rule. But his explanation was confirmed by his brother, who gave evidence, and it was accepted by the learned judge. His Honour's conclusion ought not, I think, to be disturbed.

The case against the respondent, therefore, amounts to no more than this. He supplied a few customers with wine which he poured into bottles brought by them and left with him for the purpose. Some of these bottles bore brands showing that they belonged to the sellers of wine, or of other liquor who retained ownership of the bottles. Among such bottles, on at least one occasion, were bottles of the appellants, that is, the two left by the respondent's brother. The bottles were returned to those who brought them, no confusion in the identity of the bottles being proved. On the occasion of the visit of the inspector and the customs officer, the respondent surrendered to them, as if in obedience to the law, two such bottles in exchange for the value of the wine.

What wrong to possession or property on the part of the respondent do these facts disclose ? I know of none. It cannot be trespass because there is, on the part of the respondent, no infringement upon the possession of any one. It cannot be conversion, because, on his part, there is no act, and no intent, inconsistent with the appellants' right to possession and nothing to impair or destroy it. It cannot be an innominate injury to the appellants' right to possession for which the remedy would have been a special action on the case, because he did no damage to the appellants' goods, the bottles. Detinue is, of course, irrelevant and so too would have been replevin.

In English law what amounts to an infringement upon the possessory and proprietary rights of the owner of a chattel personal is a question still governed by categories of specific wrong. Trespass was the wrong upon which reliance appeared to be placed in support of the appeal when it was opened, but, in the end, it seemed to be conceded that this cause of action was untenable. I think that it is quite clear that trespass would not lie for anything which the foregoing facts disclose. Trespass is a wrong to possession. But, on the part of the respondent, there was never any invasion of possession.

At the time he filled the two bottles his brother left with him, he himself was in possession of them. If the bottles had been out of his own possession and in the possession of some other person, then to lift the bottles up against the will of that person and to fill them with wine would have amounted to trespasses. The reason is that the movement of the bottles and the use of them as receptacles are invasions of the possession of the second person. But they are things which the man possessed of the bottles may do without committing trespass. The respondent came into possession of the bottles without trespass. For his brother delivered possession to him of the two bottles specifically in question. In the same way, if any other customer ever left bottles of the appellant with him for wine to be poured into them, those customers must have similarly delivered possession of the bottles to the respondent. His possession of the appellants' bottles was, therefore, never trespassory. That his brother was in possession of the two bottles specifically in question there can be no doubt. If, as his evidence suggests, the latter did obtain the two bottles immediately from a retailer of the appellants' wine, it may be that he held the bottles upon a bailment in which the appellants were bailors and he was bailee. Such a bailment needs a privity between them. But the inference is perhaps warranted that, in the distribution of the appellants' wines, each successive merchant or trader, from the wholesaler to the retailer, had an implied authority from the appellants to create a bailment of the bottles from the appellants to the buyer to whom the merchant or trader sold the wine. There is, however, no importance in the question whether the possession of the respondent's brother, and of any customers in like case with him, is to be considered independent or as that of a bailee from the appellants upon a bailment determinable on demand. For it has been settled for centuries, to quote the language of the *Year Book* (1498), 16 H. VII., p. 3, pl. 7 : " that where one comes to the goods by lawful means by delivery of the plaintiff immediately at the first, he shall not ever be punished as a trespasser but by writ of detinue ; nor any more shall his donee, vendee or sub-bailee who comes to the plaintiff's goods by such means " (cited by the late Mr. Justice *R. S. Wright* in *Pollock and Wright's Possession in the Common Law*, 1st ed. (1888), p. 137). Thus in *Year Book* (1462), 2 E. IV., p. 4, *Choke* says : " if the case were that I bail goods to F. to keep for my use, and F. gives them to G., I agree that I shall not have trespass against G., for he had lawful possession by reason of the bailment, and by his gift the property (i.e. special property or possession) is vested in the donee " (*Pollock and Wright*, p. 154).

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This is well illustrated by the modern case of *Mennie* v. *Blake* (1), holding that replevin, being a remedy for the wrongful taking of a chattel from the possession of the plaintiff, could not be maintained by an owner against a person to whom the chattel had been delivered by the person in possession under a bailment, a bailment in that case terminable on demand.

Some misunderstanding appeared to arise during the hearing of the appeal about two matters, which, for that reason, should be mentioned. The first is the rule that, where there has been a trespass *de bonis* an action lies against the person committing the trespass not only at the suit of the person in possession, but also at the suit of a person immediately entitled to possession. Thus, suppose that after a purchaser of the appellants' wine from a retailer had consumed the contents of the bottle, a stranger were to take the bottle out of his possession against his will; in such a case an action of trespass could be maintained against the stranger not only by the purchaser whose possession had been violated, but by the appellants as the persons immediately entitled to possession. It is sometimes said, in stating the rule, that an immediate right to possession is enough to support an action of trespass, meaning when an invasion of possession has taken place. The statement, however, seems to have been misunderstood and treated as if it meant that an owner of a chattel personal out of possession but entitled immediately to resume it could complain in trespass of any use of the chattel which he had not authorized made by the person in possession or by anyone acting under the latter's authority. This is not so. If it were so, conversion would have been an unnecessary remedy and, indeed, a wrong to a right of property would exist going far beyond the limits of that tort, which is confined to acts inconsistent with the right to possession. Further, the whole law of larceny at common law would be different and the statutory offence of larceny as a bailee need never have been created. The error is dealt with at length by the late Mr. Justice *R. S. Wright* (*Pollock and Wright*, pp. 145-147) who states the true principle, which Sir *William Holdsworth* said was implied in the earlier authorities but had not before been clearly stated (*History of English Law*, vol. 7, pp. 423, 424). It is, perhaps, desirable to set out a little of Mr. Justice *Wright's* text:—"In some cases," he says, "an owner of a thing who has never yet acquired the possession of it, or an owner who has parted with the possession, is nevertheless, in virtue of his right to possession, entitled to sue or prosecute a stranger who takes the thing; and it is of much practical and theoretical importance to discover in what cases a mere right to possession

(1) (1856) 6 El. & Bl. 842 [119 E.R. 1078].

suffices for this purpose, and on what ground. There are expressions in some cases and in text books (see *Wms. S.* 47b) to the effect that a person with a right to possession of a thing, though without possession, can always maintain trespass, as (except where the right is suspended, e.g. in a bailment for a term—*Gordon* v. *Harper* (1) ) he certainly can trover or detinue, against a stranger who takes the thing : and if this is correct the gist of the action of trespass must be the wrong to the right to possession. But it is difficult to see how there can be a forcible and immediate injury *vi et armis* to a mere legal right ; and there are some parts of the law of trespass and theft which are inexplicable on such a view. It is submitted that the correct view is that the right to possession, as a title for maintaining trespass, is merely a right in one person to sue for a trespass done to another's possession ; that this right exists whenever the person whose actual possession was violated held as servant, agent, or bailee under a revocable bailment for or under or on behalf of the person having the right to possession " (*Pollock and Wright's Possession in the Common Law*, at p. 145).

The second matter about which there appeared to be some misunderstanding is the effect of acts repugnant to a bailment and consequently operating as a determination of the bailment. The determination of the bailment may enable the bailor to maintain an action of conversion, but not of trespass.

" Any act or disposition which is wholly repugnant to (*Donald* v. *Suckling* (2) ) or as it were an absolute disclaimer of (*Fenn* v. *Bittleston* (3) per *Parke* B. Cp. *Cooper* v. *Willomatt* (4) and *Bryant* v. *Wardell* (5) ) the holding as bailee revests the bailor's right to possession, and therefore also his immediate right to maintain trover or detinue even where the bailment is for a term or otherwise not revocable at will, and so *a fortiori* in a bailment determinable at will. But in trespass and theft the wrong is not, as in trover, to the plaintiff's right to possession, and the bailment cannot be determined by any tortious act which does not destroy the very subject of the bailment ; and the only extension which this doctrine ever received at common law was that a bailee of a package or bulk might by taking things out of the package or breaking the bulk so far alter the thing in point of law that it becomes no longer the same thing—the same package or bulk—which he received and thereupon his possession was held to become trespassory " (*Pollock and Wright* at pp. 132-133).

(1) (1796) 7 T.R. 9 [101 E.R. 828].
(2) (1866) L.R. 1 Q.B. 585, at p. 615.
(3) (1851) 7 Ex., at pp. 159, 160 [155 E.R., at p. 899].
(4) (1845) 1 C.B. 672 [135 E.R. 706].
(5) (1848) 2 Ex. 479 [154 E.R. 580].

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There is some authority for the view that complete destruction of the chattel by the bailee might, for the same reason, amount to trespass. Thus Lord *Coke* in *Co. Litt.*, 71*a*: "If one lends oxen to another to plough his land, and he kills them, the owner may have trespass, or trespass on the case, at his election." After citing this passage, *Parke* B., in *Fenn* v. *Bittleston* (1), says:— "It was held, that the act of the bailee in doing a thing entirely inconsistent with the terms of the bailment, though not amounting to a destruction of the chattel, was a determination of the lawful bailment, and caused the possessory title to revert to the bailor, and entitled him to maintain an action of trover. It is true that, if it had been done by the bailee *animo furandi*, it could not have been punishable as a larceny; because, being lawfully in possession of the chattel, the taking it would not be either a trespass *vi et armis* or felony, unless the nature of the article had been changed, as by breaking open a bale; the reason for which distinction is somewhat subtle, but is fully explained in the *Year Book*, 13 Edw. 4, fol. 9*b*., namely, that the possession of the article in its original state was with the consent of the bailor, and therefore lawful; but there was no consent to the possession of the article in its altered state, so that, after the alteration, the bailment was determined."

There is a third matter which perhaps should be mentioned and that is the supposed distinction between the consequences of the delivery by a bailee of possession of a chattel to a stranger and of the stranger's taking it out of his possession by his licence. There is slender but ancient authority for the position that, in the latter case, the licence of the bailee can be treated as void, if it be wrongful as against the bailor, and since there is a taking, as distinguished from a delivery, there may be found in it a trespassory asportation. Whether this refinement would now be maintained as valid need not be considered. The purpose of mentioning it is to show that the question whether the bailee's act is unauthorized cannot be material unless his act must be relied upon as a justification for what otherwise is a trespass, that is by way of confession and avoidance as under a plea of leave and licence. A delivery of possession by the bailee, however wrongful as against the bailor, could not work an invasion of the bailee's own possession, so as to found trespass.

The plain fact in the present case is that the respondent never did any trespassory act and therefore there is no wrong of which the appellants can complain as a trespass.

Conversion appears to me to be equally out of the question. I put on one side for separate consideration the delivery of the two

(1) (1851) 7 Ex. at pp. 159, 160 [155 E.R., at p. 899].

bottles to the inspector under the *Pure Food Act*. Unless that can be construed as a conversion, that tort has no place in the case. It is not out of the case because of the appellants' situation as bailor. On the contrary, if any conversion had been committed by the respondent, clearly the appellants as the persons entitled immediately on demand to the possession of the bottles would be the proper party to complain of it. But nothing in the course pursued by the respondent in receiving and filling bottles and returning them could possibly amount to the tort of conversion. The essence of conversion is a dealing with a chattel in a manner repugnant to the immediate right of possession of the person who has the property or special property in the chattel. It may take the form of a disposal of the goods by way of sale, or pledge or other intended transfer of an interest followed by delivery, of the destruction or change of the nature or character of the thing, as for example, pouring water into wine or cutting the seals from a deed, or of an appropriation evidenced by refusal to deliver or other denial of title. But damage to the chattel is not conversion, nor is use, nor is a transfer of possession otherwise than for the purpose of affecting the immediate right to possession, nor is it always conversion to lose the goods beyond hope of recovery. An intent to do that which would deprive " the true owner " of his immediate right to possession or impair it may be said to form the essential ground of the tort. There is nothing in the course followed by the respondent in supplying wine to his customers who brought bottles to receive it involving any deprival or impairment of property in the bottles, that is of the immediate right to possession. The re-delivery of the bottles to the persons who left them could not amount to a conversion : see per *Bigham* J. in *Union Credit Bank Ltd.* v. *Mersey Docks and Harbour Board* (1). The re-delivery could not amount to a conversion because, though involving a transfer of possession, its purpose was not to confer any right over the property in the bottles, but merely to return or restore them to the person who had left them there to be filled. Indeed if they had been withheld from that person, he could have complained, at least theoretically, of an actionable wrong, that is unless it were done as a result of the intervention of the true owners and upon their demand.

To fill the bottles with wine at the request of the person who brought them could not in itself be a conversion. It was not a use of the bottles involving any exercise of dominion over them, however transitory. There was, of course, no asportation and the older cases to the effect that an asportation of chattels for the use of the person taking them, or of a third person, may amount to a

(1) (1899) 2 Q.B. 205, at pp. 215, 216.

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conversion can have no application. In any event, an intention cannot be imputed to the respondent of taking to himself the property in the bottles or of depriving the appellants thereof or of asserting any title therein or of denying that of the appellants. It was not an act derogating from the proprietary right of the appellant. There was no user on the footing that the respondent was owner or that the appellants had no title, in short no act of ownership. The essential elements of liability in trover are lacking.

Even if it had positively appeared that at times the wrong bottle was returned to the person who left one for filling, it may be doubted whether that would amount to conversion, considering the purpose and nature of the transaction and the absence of any intent to affect the ownership, particularly the ownership of branded bottles.

The special facts of the delivery to the inspector under the *Pure Food Act* of the two bottles, I have reserved for separate consideration. If the respondent had meant to sell these bottles to the inspector, then, apart from the effect of the inspector's authority to act for the appellants, no doubt the delivery to him would involve a conversion. But even so, on the remaining findings, I cannot see that the transaction would have afforded any ground at all for an injunction. It would still remain an isolated instance of a sale and one made to a person in authority. It would afford no evidence of practice or likelihood of repetition. But it has been found that it was not a sale and, in the circumstances, it must be taken that there was no intention to transfer the property in the bottles or to impair the appellants' title to immediate possession. On the side of the inspector, he was obtaining them for the appellants, and, on the side of the respondent, he was giving them over to an official who demanded them in order to examine the wine. There was no conversion, and indeed, having regard to the inspector's employment to act for the appellants, the transaction could not amount to an actual wrong to property.

There remains the remedy for special damage sustained by the owner of a chattel who is out of possession. This was a special action on the case and does not depend on the plaintiff's having the immediate right to possession. More usually the action was brought by an owner whose right to possession was suspended. If the chattel was held upon a bailment for a term or until the fulfilment of a condition, it was the only action available to the bailor, if the chattel was damaged. The foundation of the action is the damage and "permanent" damage to the chattel must have occurred, that is damage which would enure to the "reversioner."

"Probably any temporary damage done while the plaintiff's possession was suspended by her contract with another person, is not the foundation of an action," per *Pollock* C.B. in *Tancred* v.

*Allgood* (1); cf. per *Williams* J. in *Mears* v. *London and South Western Railway Co.* (2).

Where the right to possession is not suspended the kind of damage of which the person out of possession but having an immediate right thereto is entitled to complain may no doubt be less lasting. But the chattel must have suffered some injury enuring to the detriment of the owner out of possession. Clearly no damage was done to the bottles. The use to which they were put was to clean them and to fill them with wine. When the customer consumed the wine with which the bottle had been replenished, the bottle resumed its former condition. But if an attempt were made to spell out of this some damage of which the appellants might complain at law, it would be, as it seems to me, quite misconceived. For this is a suit in equity and it would not be possible to base an injunction upon anything but either the repeated infringement of a legal right not depending upon special damage or, if the cause of action at law depended on special damage, then upon threatened loss having some reality, so much reality indeed as to demand equitable relief. In my opinion, however, no legal wrong is discoverable in what has been established against the respondent.

The law of Scotland with reference to the protection of possession and property is based upon very different considerations from those of English law. But it is satisfactory to find that, for refilling the bottles of the appellants brought to him by customers, the respondent would enjoy under Scots law the same freedom from liability to the owners of the bottles, as that which appears to me so clearly to flow from the rules of the common law defining the specific torts of our system. It was so decided by the House of Lords in *William Leitch & Co. Ltd.* v. *Leydon* (3), a Scots case the material facts of which differ from this only in the circumstance that the bottle was filled whilst the customer waited, so that probably he did not deliver up possession of the bottle while it was being filled.

In point of policy there is no reason why the law should make it a civil wrong to put a chattel to some temporary and harmless use at the request and for the benefit of a person possessed of the chattel. It is not surprising, therefore, that the more technical rules of English law and those of Scots law should produce in this respect the same result.

In my opinion there is no foundation for the injunction and other equitable relief sought by the appellants and their appeal should be dismissed.

(1) (1859) 4 H. & N. 438, at p. 444 [157 E.R. 910, at p. 913].

(2) (1862) 11 C.B. (N.S.) 850, at p. 854 [142 E.R. 1029, at p. 1031].

(3) (1931) A.C. 90.

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McTIERNAN J. In my opinion this appeal should be dismissed.

The evidence proves that there were only three bottles branded with the appellant's name in the respondent's possession. It is further established that the appellant only lent these bottles and the appellant's customer bought only the contents. The bailment of each bottle to the customer was upon the terms set out in the appellant's invoice which is in evidence. The appellant was therefore the owner of each of the three bottles, which was embossed with its name and which was in the defendant's possession. The bailment of each of these bottles had determined before it came into the respondent's possession and the appellant then had the legal right to the possession of each bottle.

The appellant claims an injunction against the respondent to restrain him from infringing the appellant's rights in bottles which are its property. The value of the three bottles is obviously a very small sum of money. The question whether the respondent's rights in bottles, branded with its name, have been infringed, is a matter of importance to it because it lends a large quantity of bottles on the terms of the bailment proved in this case. But the question whether the respondent should be restrained by the injunction claimed by the appellant depends upon the wrong, if any, which the evidence proves that he did to the appellant's rights and whether he intends, or asserts a right, to use any bottles in violation of those rights. I have come to the conclusion that the only wrong of which there is evidence is a conversion by the respondent of two of the appellant's bottles and that the case is not a proper one for an injunction.

Upon the authority of *William Leitch & Co. Ltd.* v. *Leydon* (1), it can be said that the respondent did not owe a duty to the appellant to examine any empty bottle tendered to him, to find out if it was the appellant's property. Notwithstanding the absence of this duty the appellant is entitled to complain if the respondent has done anything with any of these three bottles which is an infringement of the appellant's rights therein.

There is a question of estoppel dealt with by *Jordan* C.J., with whose judgment *Street* and *Roper* JJ. agreed. This suggested estoppel against the appellant's complaining of an infringement of its rights seems to be a development of an idea introduced in the reasons for judgment in *William Leitch & Co. Ltd.* v. *Leydon* (2). Lord *Buckmaster* said (3) that it is " in accordance with common experience, that such ultimate purchaser," that is, the member of the public buying the contents of a bottle for use or consumption, " becomes

(1) (1931) A.C. 90.
(2) (1931) A.C., at pp. 98, 100, 101, 111.
(3) (1931) A.C., at p. 100.

apparently the absolute owner of the bottle " and can put it to any use " which ingenuity may suggest." His Lordship said at the end of his judgment that, in the view which he took of the case, it was unnecessary for him to decide the question, which to his mind was a difficult one, namely, " whether, when the appellants parted with the possession of these bottles on terms which they must be assumed to know would not be made binding on the ultimate purchaser, and clothed their customer with the full apparent power of making a good title to the bottle, they could afterwards seek assistance by interdict for an alleged wrong from the responsibility of which their own conduct was not entirely free " (1).

The respondent, however, does not need to rely upon the suggested estoppel to defend himself against the allegation that he became a wrongdoer by delivering two of the bottles in his possession branded with the appellant's name to Moon. The request for these bottles was made by Moon on the authority of the appellant and the other members of the Associations formed to protect their rights in branded bottles ; Moon was their employee as well as an inspector under the *Pure Food Act* 1908-1944 (N.S.W.). I think that the following statement by Lord *Blanesburgh* in *William Leitch & Co. Ltd.* v. *Leydon* (2) applies to the present case :—" It is true that the property in the empty bottles presented to and filled by the respondent was indubitably in the appellants, but it is equally true that the requests to fill them made to the respondent were made on the authority and instructions of the appellants and with the desire that they should be acceded to. Of what trespass then, it may be asked, was the respondent guilty when he deferred so readily to all the proved requests ? In my judgment he was, as it happened, guilty of no trespass whatever. ' *Volenti non fit injuria.*' It may be that, in view of the nature of the wrong complained of in cases like this, it can never be possible to prove that it has been committed by resorting to anything in the nature of a trap order." I agree with the finding of *Nicholas* C.J. in Eq. that the respondent did not intend to sell the two bottles which he delivered to Moon. As regards the two bottles, the subject of the transaction with Moon, it is therefore necessary for the appellant to rely upon the respondent's user of them prior to Moon's visit.

It has been stated that the appellant had the property in these bottles. It had parted with possession of each of them when the customer had taken delivery of the wine which it contained, but as the bailment to the customer had determined the legal right to possession had again arisen in the appellant. In *Burroughes* v. *Bayne* (3), *Martin* B., in distinguishing between the action of trespass to

(1) (1931) A.C., at p. 101.
(2) (1931) A.C., at pp. 108, 109.
(3) (1860) 5 H. & N. 296, at pp. 301, 302 [157 E.R. 1196, at p. 1198].

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goods and the action of trover, said that the first " appears more immediately directed to the taking of a man's property out of the possession of the owner " and in referring to the second, said that it was an action " whereby a person entitled to the possession of goods wrongfully detained from him was entitled by law to recover damages for their detention." In *Ward* v. *Macauley* (1), Lord *Kenyon* makes the same distinction between these two actions. In *Smith* v. *Milles* (2), *Ashhurst* J. said : " To entitle a man to bring trespass, he must, at the time when the act was done, which constitutes the trespass, either have the actual possession in him of the thing, which is the object of the trespass, or else he must have a constructive possession in respect of the right being actually vested in him."

As I have already said, there was, in my opinion, a conversion by the respondent of the two bottles which Moon took away. In my opinion the use which the respondent made of those bottles before Moon took them constituted this conversion. The evidence proves that the respondent filled these two bottles with wine he had for sale in order to fulfil an order given to him by his brother, that he corked the bottles and kept them in store in order to deliver them to his brother when he called for them. I cannot gather from the evidence what specific use the respondent made of the third bottle branded with the appellant's name, or intended to make of it. It was one of a heap of bottles consisting mainly of a variety not of the kind embossed with the appellant's name. The respondent used bottles of that variety as receptacles for wine which he syphoned from casks.

In *Fouldes* v. *Willoughby* (3) *Alderson* B. said :—" Any asportation of a chattel for the use of the defendant, or a third person, amounts to a conversion ; for this simple reason, that it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times and in all places. When, therefore, a man takes that chattel, either for the use of himself or of another, it is a conversion." In *Burroughes* v. *Bayne* (4), *Martin* B. said that he agreed with the above statement by *Alderson* B. Mr. Justice *Blackburn*, as he then was, said in *Hollins* v. *Fowler* (5) :—" It is generally laid down that any act which is an interference with the dominion and right of property of the plaintiff is a conversion, but this requires some qualification. From the nature of the action, as explained by Lord *Mansfield*, it follows that it must

(1) (1791) 4 T.R. 489, at p. 490 [100 E.R. 1135].
(2) (1786) 1 T.R. 475, at p. 480 [99 E.R. 1205, at p. 1208].
(3) (1841) 8 M. & W., at p. 548 [151 E.R., at p. 1156].
(4) (1860) 5 H. & N. 296 [157 E.R. 1196].
(5) (1875) L.R. 7 H.L. 757, at p. 766.

be an interference with the property which would not, as against the true owner, be justified, or at least excused, in one who came lawfully into the possession of the goods." After stating certain qualifications of the statement that an asportation is always a conversion, Mr. Justice *Blackburn* added : " I cannot find it anywhere distinctly laid down, but I submit to your Lordships that on principle, one who deals with goods at the request of the person who has the actual custody of them, in the *bona fide* belief that the custodier is the true owner, or has the authority of the true owner, should be excused for what he does if the act is of such a nature as would be excused if done by the authority of the person in possession, if he was a finder of the goods, or entrusted with their custody." This principle would not excuse what the respondent did with the appellant's two bottles which he filled with wine which was to be delivered to his brother. This user of these bottles was inconsistent with the dominion and right of property of the appellant in the bottles ; the respondent used them in his business as receptacles for the wine ordered by his brother.

In *William Leitch & Co. Ltd.* v. *Leydon* (1) there were questions whether what the respondent did amounted to a user of the bottle presented to him by the customer and whether he had the legal possession of it or whether the customer temporarily transferred the manual custody of it to him : See (2). I think in the present case that the respondent's brother did transfer to the respondent the legal possession in the bottles which he delivered to the respondent to fill with wine, and that the respondent took and used those bottles for the purposes of his own business and for his brother's purposes.

There is no evidence that the respondent infringed the appellant's rights in any other way than by a conversion of two, or at the most three, of the appellant's bottles. I cannot see any evidence of a threatened further infringement to a material extent, or at all, of the appellant's rights.

*Nicholas* C.J. in Eq. made this finding : " Nor could it be said against the defendant that he acted systematically and intentionally in collecting or disposing of the plaintiff's bottles and would, if not prevented, continue to do so." *Jordan* C.J., with whom *Street* and *Roper* JJ. concurred, reached this conclusion (3) : " The evidence does not, in my opinion, establish that the defendant was in any systematic way or to any substantial extent dealing with the plaintiff company's bottles in a manner inconsistent with its actual ownership,

(1) (1931) A.C. 90.
(2) (1931) A.C., at pp. 99, 100, 102, 111.
(3) (1946) 46 S.R. (N.S.W.), at p. 222 ; 63 W.N., at p. 104.

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and does not establish on his part actual knowledge or, by virtue of some supposed duty of examination by him, justify the attribution to him of imputed knowledge that he was handling bottles in fact belonging to the plaintiff company except rarely and casually." These conclusions are justified by the evidence and I see no grounds for disagreeing with them.

In my opinion both Courts below were right in holding that this is not a proper case for an injunction. The appellant should be left to pursue any remedies it may have at common law.

WILLIAMS J. This is an appeal by special leave from a decree of the Full Court of the Supreme Court of New South Wales in Equity dismissing with costs an appeal from a decree made by the Chief Judge in Equity dismissing with costs a suit brought by the appellant as plaintiff against the respondent as defendant. The principal relief claimed by the plaintiff in its statement of claim was an injunction to restrain the defendant his servants and agents from collecting or disposing of, or parting with the possession of or in anywise dealing with or handling the plaintiff's bottles except such of them as contained at the time wine or brandy put on the market and bottled by the plaintiff, and from placing other liquor in any of the bottles.

The plaintiff is a company which carries on the business of a vigneron and wine and spirit merchant. In the course of its business it manufactures and sells large quantities of wine and brandy. For this purpose it has specially manufactured to its order a large number of bottles on the shoulder of each of which there is moulded the words " Penfolds," and towards the bottom, " This bottle is the property of Penfolds Wines Ltd." or " This bottle always remains the property of Penfolds Wines Ltd."

The plaintiff sells its wine and brandy in these bottles, one of the terms of sale being that the bottles are to remain its property and are delivered to the purchaser solely for the purpose of enabling the contents to be used and only for retailing, consuming, or using the wine or brandy contained in the bottles; and so that when the contents are once used the bottles must forthwith on demand be handed or given over or returned to the plaintiff or its agent and must not be destroyed or damaged or parted with or used for any but the foregoing purposes.

The defendant is the licensee of an hotel at Singleton. On 7th November 1944 two witnesses, Moon and Smith, called by the plaintiff, visited this hotel. Moon was a pure food inspector employed under the *Pure Food Act* 1908-1944 (N.S.W.). Smith was a customs inspector employed under the *Customs Act* 1901-1936. Moon was

also employed by the Brand Protection Association of New South Wales Ltd. with which is affiliated the Branded Bottle Association of which the plaintiff is a member. One of the purposes of this association is to protect the rights of the plaintiff and other companies which sell the contents of bottles moulded in a similar manner to that of the plaintiff's bottles. These two witnesses went to the hotel in their official capacity and there transacted certain public business. They then went with the defendant to his store. There is some discrepancy between their evidence and that of the defendant as to the events which then took place. The learned trial judge, who had an opportunity of observing the witnesses, accepted the defendant's evidence and the appeal must be disposed of on this finding.

From this evidence it appears that there was a barrel of Tulloch's wine in the store and, in addition to a large number of other bottles, a separate collection of twelve bottles, six of which were filled with Tulloch's wine. Two of the filled bottles were the plaintiff's branded bottles and were corked with its corks. A third filled bottle was moulded with " Tintara " on the shoulder and towards the bottom the words, " This bottle always remains the property of Hardy and Sons Ltd." Moon and Smith said that the defendant sold these three bottles of wine to Moon for four shillings each. The defendant said that he handed the bottles to Moon because he believed that Moon was still exercising his rights under the *Pure Food Act* and required the wine for analysis, and that the money was paid as compensation. He also said that the twelve bottles had been delivered to him by his brother shortly before this visit, already washed and equipped with corks, to be filled with wine and that he had filled them that morning and that they were ready for re-delivery to his brother when he called for them.

In his statement of defence and in cross-examination the defendant admitted that he was in the habit of filling with wine any bottles which his customers, including his brother, delivered to him for that purpose whether such bottles were plain or branded. Bottles without any endorsement are called in the trade clean bottles, and it is clear from the defendant's evidence that he knew that there were restrictions in the use of branded bottles, and that for that reason clean bottles were much sought after by licensees. He said, " I understand I could not sell any one else's bottle and put a label on it and sell it, but if a man brought his own bottle I did not have to worry about that." Question : " For years your idea was that so long as it was a customer's bottle you could fill a branded bottle with anything ? " Answer : " Yes, if I had stuff to fill it I filled it."

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The learned trial judge dismissed the suit because he did not consider that an injunction should be granted in the absence of any evidence of intention by the defendant to make a business of selling the plaintiff's bottles or to refuse to return them when called upon to do so; and that, in the absence of any contractual relationship between the parties, there was no duty in the defendant to examine the bottles and no handling of the plaintiff's goods which would entitle it to an injunction. On appeal to the Full Court the Chief Justice (in whose judgment the other two judges concurred) was of opinion that there was a notorious trade usage covering a wide range of commodities, of which the Court should take judicial notice, that they were sold in containers on the implied term that the sale included the container. The defendant was therefore entitled to assume that by virtue of this usage empty bottles, brought to him by his customers as receptacles for such wine as he might be disposed to sell them, were no longer the property of the original vendor unless the contrary was brought to his notice. His Honour also said that the evidence did not establish that the defendant was in any systematic way or to any substantial extent dealing with the plaintiff's bottles in a manner inconsistent with its ownership, and that the evidence did not establish actual knowledge or justify the attribution of imputed knowledge to the defendant, except rarely and casually, that he was handling its bottles.

It was admitted before us that the facts found by the learned trial judge would not support so wide an injunction as that claimed in the statement of claim. We were asked to grant an injunction restraining the defendant, his servants or agents from in any manner using any bottles of the plaintiff with the words, "This bottle is the property of Penfolds Wines Ltd." or the words "This bottle always remains the property of Penfolds Wines Ltd." moulded or embossed thereon, for the purpose of placing therein any liquid and from delivering any such bottle to any person with any liquid therein other than liquid manufactured by and placed therein by the plaintiff.

I cannot think that the Full Court was justified in relying upon any trade usage. The plaintiff's bottles were not simply branded with its name which might merely have denoted that they were the original vendors. The bottles were also branded with an express notice that they were the plaintiff's property. There is evidence that over forty large companies are members of the Branded Bottles Association and sell their beverages in bottles branded in the same way. The plaintiff has been using its present brands since 1930. In 1942 the defendant himself had bought the contents of bottles branded in this manner from the plaintiff. When counsel for the plaintiff

sought to prove advertisements in the public press warning the public that the ownership of the bottles remained in the members of the association, the evidence was objected to as irrelevant and rejected. His Honour pointed out that the defendant was not relying on usage. The defendant is a member of the United Licensed Victuallers Association and received a copy of its journal published in November 1943 in which the Branded Bottles Association advertized that the bottles of its members, bearing similar endorsements to those of the plaintiff's, were not sold with their contents and, on being emptied, must not be refilled or used again for any other purpose.

The defendant did not rely on usage in his statement of defence. It is clear from his evidence that he knew that branded bottles were not sold with their contents but remained the property of the original vendors. He said he knew that he could not buy the bottles, put a label on them, fill them with wine and sell them. His defence was that, although the property remained in the original vendors, he did not think that it was a legal wrong for him to fill them with wine if they were brought to him for that purpose by his customers.

Nor do I think that the case depends upon whether there was a duty on the defendant to examine any bottles which were brought to him by his customers to see whether they bore any endorsement indicating their ownership. The existence of such a duty was discussed in *William Leitch & Co. Ltd.* v. *Leydon* (1), but the decision turned on Scotch law to which different considerations apply. Viscount *Dunedin* said :—" The law of England as to trover and conversion is, in many senses, a very technical law, and it is largely put aside now in modern times ; but those older authorities go very technically upon English distinctions. Trespass as to a chattel in a Scotch lawyer's mouth is a perfectly unmeaning phrase " (2).

The principle of English law is that persons deal with the property in chattels or exercise acts of ownership over them at their peril : *Fowler* v. *Hollins* (3), affirmed by the House of Lords in (4) ; *William Leitch & Co. Ltd.* v. *Leydon* (5) ; *Jelks* v. *Hayward* (6) ; *Bowmaker Ltd.* v. *Wycombe Motors Ltd.* (7).

In *Kerr* on *Injunctions*, 6th ed. (1927), p. 93, it is stated that the Court of Equity will grant an injunction in the case of trespass to goods where the trespass, though not of a continuing nature, is threatened to be repeated, and I can see no reason in principle why

(1) (1931) A.C. 90.
(2) (1931) A.C., at pp. 102, 103.
(3) (1872) L.R. 7 Q.B. 616, at p. 639.
(4) (1875) L.R. 7 H.L. 757.
(5) (1931) A.C., at p. 107.
(6) (1905) 2 K.B. 460.
(7) (1946) 62 T.L.R. 437.

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an injunction should not equally be granted where there is a threatened repetition of any other unlawful dealing with the plaintiff's goods. The plaintiff only proved that the defendant filled with wine two of its bottles brought to him by his customers. The defendant however claimed the right to fill any such bottles whenever they were so brought. The plaintiff's purpose in retaining the property in its bottles was to enable it to use them several times, so that any course of dealing which would delay their return in any number would cause the plaintiff serious loss and damage in its business. At common law a separate cause of action would arise in respect of each bottle and only trivial damages could be recovered. Common law would not therefore provide an adequate remedy. The plaintiff's right to an injunction cannot depend upon the number of actual instances in which it was able to prove that the defendant so filled its bottles. It depends upon the defendant's admission of his practice in the past and upon his claim to continue this practice in the future. If this conduct of the defendant gave the plaintiff a cause of action at common law I can see no reason why an injunction should not be granted.

It is pointed out in *Salmond* on *Torts*, 10th ed. (1945), pp. 279, 280, by *W. T. S. Stallybrass*, that there are three distinct methods in which one man may deprive another of his property. 1, by wrongly taking it; 2, by wrongly detaining it; and 3, by wrongly disposing of it; and that corresponding to these three modes of wrongful deprivation there were three distinct forms of action provided by the law :—1, trespass *de bonis asportatis*, for wrongful taking; 2, detinue, for wrongful detention; and 3, trover, for wrongful conversion (that is to say disposal).

In *Pollock and Maitland's History of English Law*, 2nd ed. (1923), vol. 2, pp. 156 *et seq.*, there appears a history of the origin and development of the action of trespass. The writ of trespass became common near the end of Henry III.'s reign : " It was a flexible action; the defendant was called upon to say why with force and arms and against the king's peace he did some wrongful act. In the course of time the precedents fell into three great classes; the violence is done to the body, the lands, the goods of the plaintiff. The commonest interference with his goods is that of taking and carrying them away; a well-marked sub-form of trespass is trespass *de bonis asportatis* . . . the man whose goods have been taken away from him can by writ of trespass recover, not his goods, but a pecuniary equivalent for them " (*Pollock and Maitland*, at pp. 166, 167).

From these pages and from the citations in the *Year Books* in the articles in the *Harvard Law Review* referred to in the footnotes it is apparent that the action of trespass to goods is a personal action. At first the trespasser by acquiring the possession also acquired the property in the goods and the dispossessed owner was left to his personal action for damages. An owner did not acquire a right *in rem* until the birth of the action of detinue. " The action of detinue was essentially a proprietary action implying property in the plaintiff in the goods claimed. . . . It was, and still is, of the essence of an action of detinue that the plaintiff maintains and asserts his property in the goods claimed up to the date of the verdict." *Rosenthal* v. *Alderton & Sons Ltd.* (1).

But detinue was an unsatisfactory action because it " did not afford a remedy if the bailee misused the chattels, or if he restored them in a damaged condition, nor could damages be obtained " against a third party who had destroyed the goods. It was also " an exceedingly unsatisfactory form of action, for the defendant had the right of defending himself by wager of law, a form of licensed perjury which reduced to impotence all proceedings in which it was allowable. . . . Hence the action of trover as a remedy for conversion. Conversion came to be treated for the first time as an independent wrong—to be sued for in a special form of trespass on the case." *Salmond* on *Torts*, 10th ed. (1945), p. 281.

The ordinary action of trespass *de bonis asportatis* is where the goods are taken out of the actual possession of the owner. The slightest asportation is sufficient : *Kirk* v. *Gregory* (2). The person in the present case in actual possession of the bottles immediately prior to their delivery to the defendant was his brother. They had apparently come into the brother's possession when he had purchased two bottles of the plaintiff's wine in a shop in Singleton.

It must be implied, I think, from the terms of the original bailment that, upon a re-sale of the wine by the retailer, there would be a sub-bailment of the bottles to the purchaser upon the terms of the original bailment. It was a breach of these terms for the brother to deliver the bottles to the defendant to be re-filled with wine. This breach determined the bailment and the plaintiff then became entitled to their immediate possession. In *Plasycoed Collieries Co. Ltd.* v. *Partridge, Jones & Co. Ltd.* (3), *Hamilton* J., as Lord *Sumner* then was, said : " It is well-established law that where chattels have been placed in the hands of a bailee for a limited purpose, and he deals with them in a manner wholly inconsistent with the terms

(1) (1946) 1 K.B. 374, at pp. 377, 378.
(2) (1876) 1 Ex. Div. 55.
(3) (1912) 2 K.B. 345, at p. 351.

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of the bailment, and consistent only with his intention to treat them as his own, the right to the possession revests in the owner, who can sue the bailee in trover." See also *Fenn* v. *Bittleston* (1); *Nyberg* v. *Handelaar* (2); *Whiteley* v. *Hilt* (3).

If there had been an asportation either the plaintiff as the person entitled to the immediate possession or the brother, as the person in actual possession, could have sued the defendant in trespass: See per *Parke* B. in *Nicolls* v. *Bastard* (4); *The Winkfield* (5); *Eastern Construction Co. Ltd.* v. *National Trust Co. Ltd.* (6). But the bottles were not taken out of the possession of the brother by the defendant but were delivered by him to the defendant. There was therefore no asportation of the bottles from the person in actual possession and I do not see how the plaintiff could have sued the defendant in trespass. Nor could it have sued the defendant in detinue because it is a condition precedent to this cause of action that there has been a demand for a return of the goods and a refusal before the issue of the writ: *Clayton* v. *Le Roy* (7).

The crucial question is therefore whether there was a conversion or threatened conversion of the bottles by the defendant. It is unnecessary to discuss whether the delivery to Moon was a conversion. This was an isolated act done under special circumstances. Even if it was a conversion, as there was no threat of repetition, there was no ground for granting an injunction. The claim for an injunction must rest on what the defendant had intended to do with the bottles but for Moon's intervention and his claim of right and threat to fill any other bottles brought to him by his customers in the future.

I am satisfied that when the defendant filled and corked the two bottles, he must have seen the brands and known that he was using bottles which were not the property of his brother but of the plaintiff. Alternatively, I am satisfied that the plaintiff gave the defendant sufficient notice that the bottles were its property. In *Caxton Publishing Co. Ltd.* v. *Sutherland Publishing Co.* (8), Lord *Porter* said: "Conversion consists in an act intentionally done inconsistent with the owner's right, though the doer may not know of or intend to challenge the property or possession of the true owner." One form of conversion referred to in *Chitty* on *Pleading*, 7th ed. (1844), vol. 1, p. 172, in a passage cited with approval by *Brett* J. in *Hollins* v. *Fowler* (9), is "illegally using, or misusing goods;

(1) (1851) 7 Ex. 152 [155 E.R. 895].
(2) (1892) 2 Q.B. 202.
(3) (1918) 2 K.B., at p. 819.
(4) (1835) 2 C.M. & R. 659, at p. 660 [150 E.R. 279, at p. 280].
(5) (1902) P. 42.
(6) (1914) A.C. 197, at p. 210.
(7) (1911) 2 K.B. 1031, at p. 1050.
(8) (1939) A.C. 178, at p. 202.
(9) (1875) L.R. 7 H.L., at pp. 783, 784.

. . . a user as if the defendant or someone other than the plaintiff were the owner." " The loss or deprivation of possession suffered by the plaintiff need not be permanent. The duration of the dispossession is relevant with respect to the measure of damages, but makes no difference in the nature of the wrong " : *Salmond* on *Torts*, 10th ed. (1945), p. 289. " Any other wrongful disposition of goods, if it has the effect of depriving the owner of the use of them permanently or for a substantial time, is conversion ; thus, if a person . . . hands them over to some one other than the true owner . . . such person is guilty of conversion " : *Halsbury's Laws of England*, 2nd ed., vol. 33, p. 53. In *Powell* v. *Hoyland* (1), the defendant obtained possession of certain property of the plaintiff. Subsequently, with knowledge of the plaintiff's title, he handed it over to his employers. It was held that he was guilty of conversion. In *Singer Manufacturing Co.* v. *Clark* (2), the plaintiff had bailed his goods. Either the bailee or some other person pawned them with the defendant. The plaintiff demanded delivery, but the defendant refused to deliver the goods to the plaintiff and delivered them to the pawner. It was held that he was guilty of conversion.

The importance of rights attached to ownership vary according to the nature of the particular property. Bottles are meant to be filled so that to fill the bottle of another person is to deprive him of the use of his property. In the present case the brother purported to place the defendant in possession of the bottles as a bailee for him. If they had been " clean bottles," although in fact the property of the plaintiff, the defendant might not have been guilty of conversion in filling and returning them to the person from whom he got them, unless the plaintiff had made a claim that they were its bottles and had demanded their return (*Union Credit Bank Ltd.* v. *Mersey Docks and Harbour Board* (3) ). But the endorsements on the bottles proclaimed that they were the property of the plaintiff. In *Hollins* v. *Fowler* (4), *Blackburn* J. said that " In considering whether the act is excused against the true owner it often becomes important to know whether the person, doing what is charged as a conversion, had notice of the plaintiff's title. There are some acts which from their nature are necessarily a conversion, whether there was notice of the plaintiff's title or not. There are others which if done in a *bona-fide* ignorance of the plaintiff's title are excused, though if done in disregard of a title of which there was notice they would be a conversion." The use which the defendant made of the bottles with knowledge of the plaintiff's title was, in the words of *Blackburn* J.

(1) (1851) 6 Ex. 67 [155 E.R. 456].
(2) (1879) 5 Ex. D. 37.
(3) (1899) 2 Q.B. 205.
(4) (1875) L.R. 7 H.L., at p. 766.

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on the same page, " an interference with the property which would not, as against the true owner, be justified, or at least excused, in one who came lawfully into possession of the goods." He was, in the words of *Brett* J. (1) " using the goods with the intent to exercise an act of ownership on his own behalf, or of some one (that is, his brother) other than the plaintiff."

For these reasons I would allow the appeal and grant an injunction substantially in the limited form now claimed.

*Appeal dismissed with costs.*

Solicitors for the appellant, *Allen, Allen & Hemsley.*

Solicitors for the respondent, *A. B. Shaw & Co.*, Singleton, by *Shaw, McDonald & Co.*

J. B.

(1) (1875) L.R. 7 H.L. 784.