WHITBREAD
v.
REYNOLDS

Reasons for Judgment

14/9/1949 ?

WHITBREAD v. REYNOLDS.

ORDER.

Appeal dismissed with costs. Order of Supreme Court varied by directing that the plaintiff pay to the defendant the costs of the second trial.

J.S.C.

WHITBREAD v. REYNOLDS.

REASONS FOR JUDGMENT (ORAL). LATHAM C.J.

In this action the plaintiff Hedley D. Whitbread claimed as against the defendant Thomas H. Reynolds damages for the conversion of three horses, Charm Gold, Alfred and Watajoke. They were all foals of a mare named Becharm. The action was tried by His Honour the Chief Justice of Western Australia and the plaintiff succeeded with respect to the horse Charm Gold but failed as to the horses Alfred and Watajoke. Upon appeal to this court a new trial was ordered upon the issues relating to Alfred and Watajoke. The new trial was held before His Honour Mr. Justice Walker, who dismissed the action of the plaintiff with respect to Alfred and Watajoke. His Honour regarded himself as bound by the former decision of the Chief Justice to hold that it was established that one Frank Rennie in 1936 or early in 1937 acquired by purchase the brood mare Becharm with a foal (afterwards Charm Gold) at foot. His Honour started from that proposition. Oral evidence was given. His Honour was of opinion that both the plaintiff and the defendant and some of the witnesses lied and that the oral evidence was almost completely unreliable. He found, however, that the defendant had been in possession of the horses and was in possession of the horses at the time when the writ was issued, which was the time in respect of which ownership had to be determined. His Honour also referred to correspondence which His Honour held showed that the plaintiff had not, on occasions when a claim might have been expected, made any claim to the ownership of these horses, the correspondence being with the defendant himself. Weight was given to the fact that the plaintiff, though desiring to own and race horses, was a jockey, and was therefore incompetent to own and race horses under the rules of the Turf Club, and therefore that there "had to be" a certain concealment of

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ownership of horses. His Honour's final conclusion was that the plaintiff had not convinced him that he owned the horses. His Honour was left in a state of doubt and, holding that the onus was upon the plaintiff, dismissed the action.

Upon this appeal the appellant (the plaintiff) begins with the estoppel created in relation to all the issues determined at the earlier stage of the action in the trial before His Honour the Chief Justice, and he begins, therefore, with the proposition at least that the issue of the ownership of Charm Gold was conclusively determined between the parties as at the date of the issue of the writ. That the former proceedings at least determine that issue there can be no doubt. The plaintiff, however, carries the matter further and, referring to the pleadings and the particulars in the action, contends that it was determined as against the defendant in the action that the allegation contained in the particulars which were furnished on 9th March 1948 under the statement of claim (the allegation contained in particular No. 1) was established and conclusively established as against the defendant in the earlier proceedings in this case.

An enquiry for further particulars was in this form: - "On what date and from whom and in what manner did the plaintiff become the owner of the horse Charm Gold?" The particulars given were as follows: - "On 30th November 1936 the late Frank Rennie and the plaintiff bought Becharm with Charm Gold at foot." That, it is said, was conclusively established by the earlier proceedings. That proposition is a statement that Frank Rennie and the plaintiff bought Becharm and Charm Gold. The maximum effect of any estoppel derived from this statement is that the plaintiff had a half interest in these horses in November 1936. The appellant begins with this proposition as established by estoppel, but other matters as to which there is no estoppel must be determined by evidence. A proposition which is inferred

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from a proposition as to which there is an estoppel when the latter proposition is combined with another proposition or propositions which depend upon evidence is not itself a proposition which is established by estoppel. That was decided in the case of O'Donel v. Commissioner for Road Transport and Tramways (N.S.W.), 59 C.L.R. 744.

It is necessary, therefore, to look at the evidence with respect to what took place in relation to these horses after 30th November 1936. The learned judge did not rely upon the oral evidence. He was not prepared to found a conclusion upon a positive acceptance of the oral evidence of any witness. As to the subsequent events (when I say "subsequent" I mean subsequent to November 1936) any decision in relation to which depended, not upon estoppel, as I have pointed out, but upon evidence, the onus was on the plaintiff to establish facts showing a complete title, that is, a title to the whole of the ownership as distinct from a half title in the case of Alfred and Watajoke.

Mr. Seaton, who has made the best of a difficult case, relies upon the presumption of continuance of an existing state of affairs after November 1936, but the presumption of continuance would only carry on a half interest in relation to Becharm and Charm Gold, and there is evidence of another transaction in December 1940 and January 1941. The result of this transaction was that Alfred and Watajoke, which had been registered with the Turf Club in the name of Frank Rennie, were transferred as a matter of registration to the name of the defendant. The defendant contends that he then bought the horses, i.e. what interest there was in the horses, whether it was the interest of Frank Rennie or Mrs. Rennie or anybody else. Whitbread, on the other hand, contends that the defendant was simply a dummy for him and that there was no reality in the registration of Reynolds as the owner, that being explained by the fact that Whitbread was unable, owing to the rules of the Turf Club, to appear as

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the owner. There is thus a direct conflict of evidence as to the transaction which took place at this time, and that there was a transaction in relation to the horses there is no doubt.

His Honour pays much attention to some correspondence which took place between the parties. It was pointed out for the defendant that in this correspondence Whitbread himself did not claim as against the defendant (from whom on his own case there was no necessity to conceal anything) in any clear terms or hardly by inference any ownership of the horses. In particular there is a letter of 5th December 1940 written by an officer of the Trustee Company, which was the executor of Frank Rennie's will, relating to the transaction which then took place and stating that the defendant Reynolds had made an offer for the mare, the colt and the foal, that was for Becharm, for Charm Gold and Boleto, of £30. This letter, His Honour was satisfied, was written with the knowledge and concurrence of the plaintiff. Further, there was evidence, partly contained in the correspondence, of the defendant purporting to act as owner and actually selling Alfred and Watajoke. He communicated his intention to sell to the plaintiff and the plaintiff, while making many claims with respect to many matters, because the parties had evidently fallen out at this time, did not make a clear claim to be the owner of the horses. In the circumstances of this case, where there is so much concealment and pretence admitted on all hands, it is true that the evidence of acting as owner is much less weighty than it would be in other cases. But it is some evidence. The correspondence is important as a check and the final result is that His Honour was not satisfied that the plaintiff had made out his case. In these circumstances the proper order was made and the action was rightly dismissed. The judgment of the Supreme Court should be affirmed and the appeal should be dismissed with costs.

RICH J. I agree.

WHITBREAD v. REYNOLDS.

JUDGMENT.(ORAL). McTIERNAN J.

I agree.

JUDGMENT (ORAL). DIXON J.

I agree. As the learned judge took a low view of the credibility of the witnesses and was not prepared to place his judgment on any affirmative acceptance of the story of either side the appeal was not unnaturally argued on the burden of proof. The action was one of trover and in such an action the burden of proof from beginning to end is upon the plaintiff to establish not only the conversion of the goods, but his title to them. I say "from beginning to end", meaning by that that the law places the burden of proof on the plaintiff and requires him to establish the ingredients of his cause of action to the reasonable satisfaction of the tribunal. He may so establish them by advancing his cause in a variety of ways so as to raise presumptions of fact which would authorise the tribunal of fact if no more appeared to find in his favour. But ultimately upon the whole case he must satisfy the tribunal.

In the present case the plaintiff begins by asserting that the first step in establishing his title to the two horses has been concluded by an estoppel in his favour. The estoppel is an issue-estoppel and arises from a judgment or order made in these very proceedings. A third horse was in dispute - Charm Gold. He asserted a title to CharmGold, and that title was established by a judgment in the action, which has not been set aside. It is therefore clear that as between the parties the plaintiff's title to Charm Gold at the date of the issue of the writ cannot be contested. The title to Charm Gold depended upon a set of facts which were particularised under the pleading, and it is argued that the estoppel extends further than the title to Charm Gold stated in the writ and includes the title to the dam of

Charm /

Charm Gold, Becharm. For the particulars assert that Charm Gold and its dam Becharm were purchased on 30th November 1936 by the plaintiff and one Frank Rennie in equal shares. The title to Charm Gold depended, it is claimed, on one indivisible transaction involving Becharm as well. Strictly speaking, I am of opinion that the estoppel extends no further than the essential facts appearing on the record which are necessary to establish the legal title to Charm Gold. But for the purpose of the argument we assumed that this strict view was incorrect and that the issue-estoppel did extend as far as the title to the dam. Now the title to the dam Becharm is only established as at 30th November 1936. It is necessary by evidence to trace that title to Becharm down and to show that it was unchanged at the foaling of the two horses in dispute, and, further, that the plaintiff's title so acquired to neither of the horses in dispute was changed before the date of the alleged conversion.

The defendant alleges that he acquired title to Becharm and Alfred from or through the plaintiff in December 1940 or January 1941 by a transaction which he details. As his evidence was not accepted as a matter on which affirmative reliance could be placed, this assertion appears to be disregarded in the argument on behalf of the plaintiff as to the burden of proof. To my mind it cannot be completely disregarded. It must be suspended as one of the facts which, if not proved affirmatively by the plaintiff, is a fact which the plaintiff may have to negative, because it admits of a possible transaction affecting his title. The learned judge has found that the defendant exercised what I may call ostensible ownership over the two horses claimed some time before and right up to the date of the alleged conversion. It is not a mere question of possession. The defendant openly acted as if he were owner. He exercised dominion over the two horses. It is true that those facts are logically

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consistent with there being no real ownership and with his being merely a nominee, but they are facts which are to be weighed. When there is an intermediate transaction, as alleged by the defendant, which would give title, they may have some cogency. Taking the three steps together, first on one side the supposed estoppel in relation to the dam as at 30th November 1936, last on the other side / the final exercise of dominion by the defendant in selling the horses and in the meantime the ostensible ownership of the defendant including the appearance of the defendant's name as the registered owner, registered with the Turf Club with the allowance of the plaintiff, then keeping in mind the allegation by the defendant that a sale to him took place and his evidence supporting it and adding to that the circumstance to which the Chief Justice has already referred, the letter of 5th December written by Thompson to Rennie as a prelude to just such a transaction, and the further fact that that letter was written or dictated in the presence of the plaintiff, I think the learned judge was entitled to say that the burden of proof was not displaced. He was entitled to say that consistently with the dam belonging to the plaintiff on 30th November 1936 the dam might have passed together with Alfred and the deceased horse Boleto in December 1940 or January 1941 and that Watajoke may thus have become also the defendant's property. In other words the estoppel is not enough to discharge the burden of proof and the learned judge was justified in the conclusion to which he came.