P.C.
~~No. 43 of 1964~~

Judgment
6, 1965

IN THE PRIVY COUNCIL No. 43 of 1964.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA

B E T W E E N

PACIFIC MOTOR AUCTIONS PTY. LIMITED Appellant

AND

MOTOR CREDITS (HIRE FINANCE) LIMITED Respondent

CASE FOR THE APPELLANT

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1. This is an appeal brought by Special Leave granted by Her Majesty by Order in Council dated 20th January 1964 against a judgment of the High Court of Australia dated 28th August 1963 (Taylor and Owen J.J., McTiernan J. dissenting) allowing an appeal from a verdict and judgment of the Supreme Court of New South Wales in Commercial Causes and remitting the action to the said Supreme Court for assessment of damages. Vol.1 p.250 Vol.1 p.248 Vol.1 p.229

2. (a) The circumstances out of which this appeal arises are set forth in paragraphs 3 to 23 hereof.

(b) The contentions to be urged by the Appellant are set forth in paragraphs 24 to 42 hereof.

(c) The reasons of appeal are set forth in paragraph 44 hereof.

3. The Appellant (the Defendant in the action) is a company incorporated according to the laws of the State of New South Wales and at all material times was carrying on business as a used motor vehicle dealer and auctioneer.

4. The Respondent is a company similarly incorporated and at all material times was carrying on the business of a finance house including particularly the making available to persons wishing to purchase motor vehicles of finance through the medium of hire purchase agreements.

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At all material times there was carried on in Sydney under the management of one Robert Webb a business of dealing in used motor vehicles. During the period from the latter part of 1959 to 30th June 1960 this business was carried on by Robert Webb as sole proprietor under the business name Motordom; from and after 1st. July 1960 the said business was carried on by a company Motordom Pty. Limited as sole proprietor, the said Robert Webb exercising the sole executive control of the said company and managing its said business. There is no relevant significance in the incorporation of the company and its acquisition of the business previously carried on by Robert Webb and the word "Motordom" will be used hereafter to denote the proprietor for the time being of the said business.

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6. The Appellant and Motordom had on many occasions bought and sold secondhand motor vehicles both in bulk and singularly from and to each other. From 1st January 1960 to 31st October 1960 Motordom had bought from the Appellant 264 secondhand motor vehicles for a total price of £143,854.0.0. During the same period the Appellant had bought from Motordom 173 secondhand motor vehicles for a total price of £58,910.0.0. The transactions in question in the present appeal took place on 2nd November 1960.

Vol.1. pp.130,133, 184,207

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7. The purchases made by Motordom from the Appellant were made at weekly auctions conducted by the Appellant. Robert Webb attended about 90 per centum of such weekly auctions in the year 1960 and personally placed the bids for the cars purchased by Motordom. The cars so purchased were invoiced to Motordom and in due course cheques for payment drawn by Motordom were sent to the Appellant.

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8. From time to time during 1960 representatives of the Appellant attended at Motordom's premises for the purpose of buying from Motordom second-hand motor vehicles which Motordom wished to dispose of. The practice on such occasions was for the price to be negotiated at Motordom's premises and then for a cheque drawn in favour of Motordom by the Appellant to be given to Robert Webb or one of Motordom's employees in payment for the cars purchased. It was the practice in relation to each vehicle purchased by the Appellant

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from Motordom for the Manager of the Appellant to fill in at Motordom's premises a separate form containing a declaration by Motordom signed by Robert Webb identifying the particular vehicle and its price and stating, inter alia, Vol.2 p.327

> "The vehicle is my/our sole and absolute and unencumbered property and is free from any bill of sale, hire purchase agreement, lien, charge or other adverse interest whatsoever, and no person or corporation has any rights, title or interest therein and I/we have good right and title to sell the same."

The Appellant had not in respect of any one of the 173 cars purchased by it from Motordom between 1st January 1960 and 31st October 1960 received any claims or complaints from third parties relating to the title of vehicles purchased by it from Motordom. Vol.1 p.134

9. The evidence given by the Respondent as Plaintiff in the action disclosed that from sometime early in 1960 there had been transactions between it and Motordom under which the Respondent made available finance to Motordom. Vol.1 p.42
A written agreement entitled "Display Agreement" (Exhibit W) had been signed by Robert Webb on 17th February 1960 but the evidence disclosed that the terms of this agreement had not been observed in the dealings between the Respondent and Motordom. The actual arrangement between the Respondent and Motordom was proved by a course of dealing, the objective being sought to be achieved by such dealing being the "placing" of such cars on "floor plan" by Motordom with the Respondent. The arrangement as proved, which did not conform with the original written agreement, involved Motordom's selling cars which Motordom had itself previously purchased to the Respondent for 90 per centum of their original cost price to Motordom but, during the unrestricted will of the Respondent, Motordom retained uninterrupted physical custody and possession of such cars and dealt with them as part of its trading stock with all outward indicia of ownership by Motordom. Vol.2 p.252 Vol.1 p.47

10. Motordom decided of its own volition which of its trading stock of cars it wished to place on floor plan with the Respondent. It did not Vol.1 p.47

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place all of its trading stock on floor plan with the Respondent: on 2nd November 1960 (the date of the transaction in question in this appeal) of a total stock of approximately 80 cars, approximately 20 only were on floor plan with the Respondent. The placing of cars on floor plan was ordinarily effected by Motordom's notifying the Respondent of its acquisition of the cars; if the Respondent was agreeable to accepting the cars on floor plan it paid to Motordom 90 per centum of the cost of the cars to Motordom and such transaction passed the title in the cars to the Respondent; the cars remained continuously in the uninterrupted possession of Motordom.

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11. The Respondent was duly entitled under the arrangement to take possession of cars on floor plan at any time without any prior notice to Motordom. As a part of the arrangement it was intended by the parties to it that Motordom would keep the cars amongst its trading stock and that after disposal of the cars by Motordom it would repay to the Respondent the moneys previously paid to it by the Respondent in respect of the cars; these moneys would be repaid without interest if Motordom's customer entered into a hire purchase agreement with the Respondent and with interest if no such agreement was entered into. Motordom had under the

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arrangement a right to resell the cars in its own name and at such price as it should decide, together with a right to receive the purchase money and retain it, a right to deal with the money without separating or differentiating it from its own moneys, being subject only to an obligation to account to the Respondent on such resale for the price originally paid by the Respondent to Motordom with or without interest as the circumstances might require.

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12. It was the practice of the Respondent to send a representative reasonably frequently to Motordom's premises to make a physical check on the operation of the floor plan by Motordom; that is to say, if the cars listed as being on floor plan were not in one or other of the yards then the Respondent required either that they had been replaced by other cars taken on to floor plan in their stead or else that Motordom accounted to the Respondent for the amount

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previously paid by the Respondent to Motordom. The Respondent did not usually expect to receive a cheque from Motordom each time it sold a car but if there were more cars sold than were put on floor plan in their stead then a cheque would be expected. Vol.1 p.74

13. The existence of a floor plan was not a universal practice between secondhand car dealers and finance houses; approximately two-thirds of the fifty dealers with whom the Respondent dealt did not have floor plan accommodation. Although the Appellant knew that Motordom had some vehicles on floor plan with the Respondent and that the limit of the floor plan accommodation made available by the Respondent to Motordom had in October 1960 been increased by £5,000, the Appellant did not know the actual terms of the arrangement between Motordom and the Respondent nor did it have any detailed knowledge that the 16 cars in dispute in this action were included in the floor plan arrangements. Vol.1 p.103

14. Motordom did not tell any of its customers that cars sold by it were on floor plan and on the stock cards kept by Motordom no notation appeared indicating whether or not any particular car was on floor plan. Vol.1 p.31

15. The Respondent's knowledge of the course of dealing by Motordom was established in the cross-examination of the Acceptance Manager of the Respondent (R.W. Stevens). The following points appear from this cross-examination; Vol.1 p.54

(a) The Respondent knew that Motordom had a very active and flourishing business in terms of turnover involving buying second-hand cars in its own name as Purchaser and selling them in its own name as Vendor. Vol.1 pp.54, 55.

(b) Motordom was at liberty under its arrangement with the Respondent to sell floor plan cars in its own name without disclosing the existence of the floor plan and to act in this way whether it was selling for cash or on a trade-in basis. Vol.1 pp.54, 56.

(c) The Respondent knew that it was a common practice for dealers in secondhand cars Vol.1 pp.55, 56.

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to furnish declarations that they own the vehicles being sold by them and the Respondent presumed that Motordom was furnishing such declarations to purchasers from it.

Vol.1 p.55 (d) The Respondent did not prior to 2nd November 1960 interfere in any way with Motordom's activities in buying and selling cars.

(e) On many occasions the Respondent first learnt of the sale by Motordom of cars on floor plan by discovering that the cars were no longer in Motordom's yards and on no such occasion did the respondent ever raise any query or complaint with the person who purchased from Motordom.

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Vol.1 p.57 (f) The Respondent's principal objective in its association with Motordom was the obtaining of the hire purchase business with customers of Motordom; the floor plan was of importance in maintaining the relationship with Motordom which would bring in to the Respondent the hire purchase business.

16. The action in respect of which this appeal is brought was commenced by the Respondent as Plaintiff seeking a judgment in detinue in respect of 20 motor cars or £12,765.0.0 being their value and £7,000.0.0. damages for their detention. At the hearing the claim for four of these cars was abandoned and the action proceeded as a claim for damages for the conversion of 16 cars.

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17. The Respondent claimed that of a total of 29 cars purchased by the Appellant from Motordom on 2nd November 1960, 16 of these cars were owned by it under the floor plan arrangement and it was in respect of these 16 cars that the claim for damages for conversion was made. Motordom had originally acquired these 29 cars by purchasing 11 of them from the Appellant and the remaining 18 from other Vendors. Subsequently to their purchase 16 had been placed by Motordom on floor plan with the Respondent, the remaining 13 being retained by Motordom as its own property.

Vol.1 pp.141-145. 18. On 2nd November 1960 Motordom owed the Appellant £16,510.0.0. being the purchase price

of cars previously bought by Motordom from the Appellant and in respect of which Motordom had given to the Appellant cheques which had been dishonoured. The Managing Director of Motordom and representatives of the Appellant in the evening of 2nd November 1960 after the close of business went to each of Motordom's three yards which at that time contained in all about 80 cars. The Appellant selected 29 cars and the prices thereof were ultimately agreed at £16,510.0.0. Motordom gave to the Appellant written declarations of ownership of the cars, in the terms set out in paragraph 8, the Appellant drew a cheque in favour of Motordom for £16,510.0.0. which was thereupon endorsed back by Motordom to the Appellant in satisfaction of Motordom's indebtedness and the Appellant removed the cars from Motordom's yards that night. Nothing was said about floor plan or display plan and the General Manager of the Appellant (who was in charge of the matter on behalf of the Appellant) believed that Motordom owned these 29 cars. The Respondent did not contend that the Appellant did not act "in good faith" in this transaction.

19. On the afternoon of 2nd November 1960 the Respondent orally told Motordom that Motordom's authority to handle the Respondent's stock (that is to say the cars on floor plan) was withdrawn. No step was taken by the Respondent on 2nd November 1960 to notify any person other than Motordom of this revocation or to carry it into effect in any way.

20. The Respondent subsequently to 2nd November 1960 demanded the return from the Appellant of the 16 cars forming part of the 29 cars purchased by the Appellant from Motordom on 2nd November 1960 and, consequent upon the refusal of the Appellant to deliver these cars to the Respondent, this action was commenced by Writ of Summons dated 18th July, 1961. At the hearing the Respondent sought to prove its title to the cars by proving the nature of the floor plan arrangement from the course of dealing between the Respondent and Motordom. The Appellant advanced the following matters in opposition to the Respondent's claim in the action:

(a) That the floor plan arrangement was such as to involve Motordom's purchasing cars as

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agent for the Respondent, the Respondent being an undisclosed principal; the Appellant claimed by way of cross-action that this exposed the Respondent to liability to pay to the Appellant the purchase price of cars acquired from the Appellant by Motordom and subsequently placed by Motordom on floor plan with the Respondent;

(b) That the arrangement between the Respondent and Motordom upon which the Respondent relied for its acquisition of title to the cars was not sufficiently precise to be of any legal effect and that the arrangement was void for uncertainty; the Appellant claimed accordingly that the Respondent never acquired from Motordom legal title to the cars in dispute;

(c) That the arrangement for the placing of cars on floor plan amounted to no more than the borrowing of money by Motordom from the Respondent on the security of the cars and that the documents used for the purpose of effectuating the placing of the cars on floor plan with the Respondent were bills of sale which ought to have been registered to have been of any validity;

(d) That Motordom was a mercantile agent and that the transaction on 2nd November 1960 was such as to vest in the Appellant a good title in the cars;

(e) That the Respondent was estopped from claiming against the Appellant that it was the owner of the cars.

21. At the hearing before Walsh J. the Appellant did not press the defence based on the contention that Motordom was a mercantile agent and that the Appellant had accordingly acquired a valid title to the cars from Motordom (paragraph 20(d)). Walsh J. decided in relation to the various matters of defence set forth in the preceding paragraph:

Vol.2 p.252 (a) That the original written agreement (Exhibit W) did not govern the relationship between Motordom and the Respondent and that

Motordom had not purchased cars as agent for the Respondent; the cross-action therefore failed.

(b) That the arrangement between Motordom and the Respondent was sufficiently proved by the course of dealing as amounting to a sale by Motordom to the Respondent of those cars which were placed on floor plan.

(c) That the documents used to effect placing of cars on floor plan did not amount to bills of sale.

(d) The defence based on mercantile agency was not pressed by the Appellant.

(e) That having regard both to Section 28 (1) of the Sale of Goods Act (N.S.W.) and to general principles of estoppel, the Respondent was estopped from asserting its title to the cars as against the Appellant.

22. Walsh J. entered a verdict and judgment for the Appellant (Defendant) against which the Respondent appealed to the High Court. The Appellant cross-appealed in respect of the dismissal by Walsh J. of its cross-action (referred to in paragraph 20 (a) above). In addition to pressing its cross-action the Appellant defended the appeal in the High Court on similar grounds to those on which the action had been defended before Walsh J. (abandoning once again the defence based on the ground of mercantile agency and also not pressing the defence based on the necessity to register the documents as Bills of Sale). The High Court did not regard Walsh J. as having fallen into error in respect of the cross-action or those grounds of defence which he rejected but the majority of the High Court held that he was in error in upholding the defence based on estoppel (paragraph 21 (e)).

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23. It is in respect of the defence based on estoppel (referred to in subparagraph (e) of paragraph 20 and 21 above) that this appeal is brought.

24. The Appellant's contentions on this appeal are twofold, namely:-

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(a) That Section 28 (1) of the Sale of Goods Act (N.S.W.) gives to the transaction between Motordom and the Appellant on 2nd November 1960 the same effect as if Motordom had been expressly authorised by the Respondent to enter into that transaction.

(b) That quite apart from Section 28 (1) the Respondent was within general principles estopped by its conduct from claiming or seeking to prove that Motordom was not the owner of the cars in question and entitled to deal with them as such.

25. The relevant context of the Sale of Goods Act (N.S.W.) in which Section 28 (1) appears and Section 28 (1) are expressed in that Act as follows:

"4.(2) The rules of the common law, including the law merchant, save insofar as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal and agent, and the effect of fraud, misrepresentation, duress, or coercion, mistake, or other invalidating cause, shall continue to apply to contract for the sale of goods, provided that there shall not be deemed to be or to have been any market overt in New South Wales.

"5.(2) A thing is deemed to be done 'in good faith' within the meaning of this Act when it is in fact done honestly, whether it be done negligently or not.

"26.(1) Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

(2) Nothing in this Act shall affect -

(a) The provisions of the Factors (Mercantile Agents) Act, 1923.

"28.(1) Where a person having sold goods continues or is in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him of the goods or documents of title under any sale pledge or other disposition thereof to any person receiving the same in good faith and without notice of the previous sale shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

(2) Where a person having bought or agreed to buy goods obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him of the goods or documents of title under any sale pledge or other disposition thereof to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods shall have the same effect as if the person making the delivery or transfer were a mercantile agent entrusted by the owner with the goods or documents of title."

26. The Appellant relies upon Section 28 (1) of the Sale of Goods Act (N.S.W.) not as formulating a self-contained statutory concept but rather as being an enunciation by the Legislature of a particular type of fact situation which will raise an estoppel against the first purchaser of the goods. The sub-section propounds a particular type of estoppel by conduct and it should be construed and applied with due regard to matters customarily regarded by the Courts as being relevant to estoppel. In particular the Appellant submits that provided possession in the sense of physical custody in the vendor continues uninterrupted then, for the purposes of Section 28(1), a purchaser, pledgee or disponee who has acted in good faith and without notice of the previous sale will acquire a title valid against the previous purchaser. The Appellant submits that it is irrelevant and inadmissible to enquire into the character of the vendor's continuing possession.

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27. The Appellant submits that the circumstances associated with the introduction into the relevant English legislation of the precursor to Section 28 (1) demonstrate that the provision is intended by the Legislature to extend the types of situations in which the common law will recognise an estoppel by conduct. The original provision was Section 3 of 40 and 41 Vic. c.39 (enacted on 10th August 1877), this provision following the decision of Denman J. in Johnson v. Credit Lyonnais Co. (2 C.P.D. 224) on 13th February 1877. Cockburn C.J. in his judgment on the appeal from the decision of Denman J. (3 C.P.D. 32 at 36) refers to the publicity given to the decision of Denman J. having led to the intervention of Parliament. In Johnson's case a purchaser of goods which were in the custody of a dock company left the dock warrants in the hands of the Vendor and did not take any step to have any entry made in the books of the dock company. The Vendor then pledged the goods to a third party and Denman J. asked himself as the decisive question whether the first purchaser had

> "so conducted himself as to have lost the right to follow his own goods into the hands of the purchaser or pledgee".

Denman J. answered that question no, that is to say that there was no estoppel operative against the first purchaser and this decision was upheld on appeal. It was recognised both by Denman J. and by the Court on appeal that the case was a difficult one but that the facts fell just short of establishing a common law estoppel by conduct as against the first Purchaser. It was apparently to remedy this shortcoming in the scope of the common law principles of estoppel by conduct that the precursor to Section 28 (1) was passed.

28. The Appellant submits that Section 28 (1) necessarily affects and is affected by the common law principles governing estoppels by conduct; the reference in that Section to continuing "in possession" is properly to be construed as a reference to de facto possession without any relevance attaching to any qualification of that possession arising out of some private arrangement made between the vendor and the first purchaser.

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29. Walsh J. found in favour of the Appellant on general principles of estoppel and he did not decide the argument advanced under Section 28 (1). In the High Court McTiernan J. concurred with the decision of Walsh J. Both members of the majority in the High Court rejected the Appellant's defence under Section 28(1) by relying on and applying the decision of MacKinnon J. in Staffordshire Motor Guarantee Limited v. British Wagon Company Limited ((1934) 2 K.B. 305), a decision which had been referred to with approval by Devlin J. (as Lord Devlin then was) in Eastern Distributors Limited v. Goldring ((1957) 2 Q.B. 600). The Staffordshire Motor Guarantee case was accepted by Devlin J. as authority for the proposition that a provision such as Section 28 (1) does not apply where after sale by the vendor

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> "the character of the possession has changed ... Although the possession never passed physically away from" the vendor "its character was changed from that of seller to bailee and so the section would not apply." (page 614)

30. The Appellant respectfully submits that the Staffordshire Motor Guarantee case should not be regarded as a satisfactory authority laying down any principle of general application. MacKinnon J. reached his decision in reliance upon and by applying the decision of the New Zealand Court of Appeal in Mitchell v. Jones ((1905) 24 N.Z.L.R. 932). The Appellant submits that Mitchell v. Jones is itself not open to challenge but that it does not support the decision in the Staffordshire Motor Guarantee case; Mitchell v. Jones was directed to a situation in which a vendor had sold a horse and completed the sale by making delivery to the purchaser; it was not until some thirteen days later and then by an entirely separate arrangement for lease that the physical custody of the horse came back to the original vendor. In relation to the phase in the Section

> "where a person having sold goods continues or is in possession of the goods ..."

the New Zealand case turned on the words "or is".

31. In the Staffordshire Motor Guarantee case there was one entire transaction in which the

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vendor sold the motor vehicle in dispute to the first purchaser and took it back on hire purchase; the motor vehicle did not leave the custody of the vendor. A subsequent disposition of the motor vehicle by that vendor was held by MacKinnon J. not to confer any valid title on the second purchaser. His Lordship said that the vendor's possession of the motor vehicle at the time of the second purported disposition

> "was not the possession of a seller who had not yet delivered the article sold to the buyer, but was the possession of a bailee under the hire purchase agreement". (page 314)

His Lordship then quoted from Mitchell v. Jones, said that he thought that the reasoning in that case was sound, that the same principle ought to apply under the words of the English Section

> "and that the decision in that case applies to the facts of this case". (page 316)

The Appellant submits that Mitchell v. Jones is not a decisive authority on the facts in the Staffordshire Motor Guarantee case. There is no basis within the Section itself for regarding as mutually exclusive the concept of

> "the possession of a seller who had not yet delivered the articles to the buyer"

and

> "the possession of a bailee under the hire purchase agreement".

The relevant Section was not considered in what is submitted to be its true context, that is to say as a statutory extension of the field of estoppel as recognised at common law. This led to MacKinnon J. travelling beyond the express words of the Section and treating as decisive not the mere fact of possession (which is all that is expressly referred to in the Section) but the quality of possession. The Appellant submits that if the words of the Section are to be extended then the extension should be in the direction of the appearance of possession and

not in the direction of the ascertainment of the character of possession.

32. The Staffordshire Motor Guarantee Case has been referred to from tine to time in subsequent decisions of the Courts. In Union Transport Finance Ltd. v. Ballardie ((1937) 1 K.B. 510) it was distinguished on the facts by du Parcq J. In Old's Discount v. Krett ((1940) 2 K.B. 117) the facts bore a strong resemblance to Mitchell v. Jones; Stable J. referred to the Staffordshire Motor Guarantee case but in fact applied the extract from Mitchell v. Jones set out in the judgment of MacKinnon J. In Eastern Distributors v. Goldring ((1957) 2 Q.B. 600) the Court of Appeal (Lord Goddard C.J. Romer L.J. and Devlin J.) was referred in argument to the Staffordshire Motor Guarantee case; the report of the argument does not indicate that the decision was subject to any examination or criticism nor does it appear from the passage in the judgment where reference is made to that case (on page 614) that the Court of Appeal had been invited to consider its correctness or its true extent. The Appellant respectfully submits that neither the Staffordshire Motor Guarantee Case nor the subsequent decisions in which reference has been made to that case should be held to preclude the Appellant from relying upon Section 28 (1) in the present case.

33. In 1929 the Appellate Division of the Ontario Supreme Court applied the Canadian equivalent of Section 28 (1) without attempting in any way to analyse the quality or the nature of the possession of the Vendor subsequently to the first sale by him of the car in question (Bender v. National Acceptance Corporation: ((1929) 1 D.L.R. 222). In addition the Appellant refers to the view taken in the United States of the American equivalent of Section 28 (1); in Williston on Sales, 1948 Edition, paragraph 349, it is stated, inter alia, that the effect of the equivalent English Section was that it

> "finally settled the matter in favour of the buyer who first secured delivery although he might hold under a subsequent sale".

It is also stated in the same paragraph that the

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Section in the United States confirms a rule stated as being:

> "The general rule is perfectly well established, that the delivery of possession is necessary in a conveyance of personal chattels, as against everyone but the Vendor. When the same goods are sold to two different persons, by conveyances equally valid, he who first lawfully acquires the possession, will hold them against the other."

Not only does the Staffordshire Motor Guarantee Case run counter to the United States approach to the same problem but it has not gone entirely without question in England (Article by W.H. Goodhart in 73 L.Q.R. 455).

34. The Appellant submits that both subsections (1) and (2) of Section 28 are dealing with particular statutory extensions of the field of common law estoppel. This approach has always been accepted as regards Section 28 (2), for example in Cahn v. Pockett's Bristol Channel Steam Packet Co. ((1899) 1 Q.B. 643) at 658-661, Collins L.J. deals with problems arising under the English precursor to Section 28 (2) on a basis which stresses the importance of the outward appearance of possession in the sense of actual custody. The same approach is particularly apparent in Hugill v. Masker ((1889) 22 Q.B.D. 364). Again in D.F. Mount Limited v. Jay & Jay (Provisions) Co. Limited ((1960) 1 Q.B. 159) Salmond J. at 169 refers to the object of the subsection as being the protection of an innocent person in his dealings with a buyer "who appears to have the right to deal with the goods". Moreover in the situation which is in one sense the converse of the present case, namely where a person who has agreed to buy goods obtains possession of them from the seller under a hire purchase agreement, this has been regarded as falling within the equivalent of Section 28 (2) and enabling the title of the original Vendor to be defeated by a subsequent sale pledge or disposition on the part of the person thus in possession (Lee v. Butler (1893) 2 Q.B. 318; Hull Ropes Company Ltd. v. Adams (1895) 73 L.T. 446; Horton v. Gibbins (1897)

13 T.L.R. 408; Century Credit Corporation v. Richard (1962) 34 D.L.R. 2d 291). The wording of subsection (2) does not suggest that the subsection is inapplicable where a person having bought or agreed to buy goods obtains by some separate arrangement possession of those goods with the consent of the seller; the two relevant inquiries are: first, has the person bought or agreed to buy the goods, and, if so, has he obtained possession of them with the consent of the seller. There is nothing to suggest that the circumstances under which he obtained possession or the quality of his possession is relevant. The Appellant submits that there is similarly in relation to subsection (1) no relevance attaching to the circumstances under which the vendor is in possession or the character of his possession.

35. The Appellant submits that Section 28 (1) was intended to extend and in fact extends to any form of possession or custody in which a Vendor has not, after sale, completed the sale transaction by effecting delivery in the sense of handing over physical custody to the purchaser. And on such a construction it is submitted that the facts of the present case fall within the scope of the subsection.

36. The second ground upon which the Appellant submits that the decision of the majority of the High Court should be overruled is that on an application of general principles of estoppel the Respondent is precluded from denying that Motordom had the capacity to deal with the vehicles in question as if Motordom were the owner of them. This estoppel arises from

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(a) the fact that Motordom purported to sell the vehicles in question to the Appellant in the capacity of an owner and that the Appellant dealt with Motordom on this basis; and

(b) the fact that Motordom was purporting to deal with floor plan cars as owner and the fact that persons were dealing with Motordom on that basis was known to and acquiesced in by the Respondent; and

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(c) The facts more particularly referred to in paragraph 15 of this case.

37. The Appellant relies upon the enunciation of the general principles governing estoppels in pais by Dixon J. (as he then was) in Grundt v. Great Boulder Proprietary Gold Mines Limited ((1937) 59 C.L.R. 641 at 674-676 viz:

"The principle upon which estoppel in pais is founded is that the law should not permit an unjust departure by a party from an assumption of fact which he has caused another party to adopt or accept for the purpose of their legal relations. This is, of course, a very general statement. But it is the basis of the rules governing estoppel. Those rules work out the more precise grounds upon which the law holds a party disentitled to depart from an assumption in the assertion of rights against another. One condition appears always to be indispensable. That other must have so acted or abstained from acting upon the footing of the state of affairs assumed that he would suffer a detriment if the opposite party were afterwards allowed to set up rights against him inconsistent with the assumption. In stating this essential condition, particularly where the estoppel flows from representation, it is often said simply that the party asserting the estoppel must have been induced to act to his detriment. Although substantially such a statement is correct and leads to no misunderstanding, it does not bring out clearly the basal purpose of the doctrine. That purpose is to avoid or prevent a detriment to the party asserting the estoppel by compelling the opposite party to adhere to the assumption upon which the former acted or abstained from acting. This means that the real detriment or harm from which the law seeks to give protection is that which would flow from the change of position if the assumption were deserted that led to it. So long as the assumption is adhered to, the party who altered his situation upon

the faith of it cannot complain. His complaint is that when afterwards the other party makes a different state of affairs the basis of an assertion of right against him then, if it is allowed, his own original change of position will operate as a detriment. His action or inaction must be such that, if the assumption upon which he proceeded were shown to be wrong and an inconsistent state of affairs were accepted as the foundation of the rights and duties of himself and the opposite party, the consequence would be to make his original act or failure to act a source of prejudice. Thus, when, in Holt v. Markham, the fact that the defendant had spent the money sued for, believing it to be his own to spend, was treated as a sufficient alteration of his position to estop the plaintiff from departing from the assumption which had induced, the harm or detriment giving rise to the estoppel was that which would be done by requiring the defendant to repay money which he no longer had. When a bailee is estopped from denying his bailor's title to the goods, the detriment on which the estoppel is based is that which would ensue from placing goods in the possession of a person if he were permitted to set up a title to retain the goods or a right to hand them over to a stranger. An example of another kind is supplied by the facts of Yorkshire Insurance Co. v. Craine. The detriment to the insured arose from his having submitted to the insurer's claim to retain possession of the salvage. But in reality the detriment was that which would ensue if the insurer were permitted to deny that the insured had made under the policy a valid claim; because the existence of such a claim alone entitled the insured to possession of the salvage and to permit the insurer to obtain both that advantage and the advantage of repudiating the insured's claim as out of time would give him a combination of advantages amounting to a detriment to the insured.

Fulfilment of the condition which so far I have discussed is not enough to make it

just to preclude a party from setting up a state of facts. The justice of an estoppel is not established by the fact in itself that a state of affairs has been assumed as the basis of action or inaction and that a departure from the assumption would turn the action or inaction into a detrimental change of position. It depends also on the manner in which the assumption has been occasioned or induced. Before anyone can be estopped, he must have played such a part in the adoption of the assumption that it would be unfair or unjust if he were left free to ignore it. But the law does not leave such a question of fairness or justice at large. It defines with more or less completeness the kinds of participation in the making or acceptance of the assumption that will suffice to preclude the party if the other requirements for an estoppel are satisfied. A brief statement of the recognised grounds of preclusion is contained in the reasons I gave in Thompson v. Palmer and it is convenient to repeat it:- 'Whether a departure by a party from the assumption should be considered unjust and inadmissible depends on the part taken by him in occasioning its adoption by the other party. He may be required to abide by the assumption because it formed the conventional basis upon which the parties entered into contractual or other mutual relations, such as bailment; or because he has exercised against the other party rights which would exist only if the assumption were correct, as in Yorkshire Insurance Co. v. Craine: cp Cave v. Milles; Smith v. Baker; Verschures Creameries Ltd. v. Hull and Netherlands Steamship Co.; and Ambu Nair v. Kelu Nair; or because knowing the mistake the other laboured under, he refrained from correcting him when it was his duty to do so; or because his imprudence, where care was required of him, was a proximate cause of the other party's adopting and acting upon the faith of the assumption; or because he directly made representations upon which the other party founded the assumption'."

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38. There is a considerable degree of apparent conflict between many decisions of the highest authority on estoppels by conduct (for example Farquharson Bros. & Co. v. King & Co. (1902) A.C. 325; Commonwealth Trust v. Akotey (1926) A.C. 72; and Mercantile Bank of India Limited (1938) A.C. 287; cf. article by A.L. Pickering in 55 L.Q.R. 400). It is respectfully submitted that this apparent conflict is due to many of the decisions on the point being no more than decisions of fact. Whilst the general principle is well settled, its application to different sets of facts necessarily involves questions of considerable nicety but these are questions of fact and not questions of law.

39. The Appellant submits that the express basis on which the Judge at first instance in the present case (Walsh J.) upheld the defence of estoppel is entirely in accord with the established principles and is amply supported by the facts as found by him. The specific passage in the judgment of Walsh J. is:- Vol.1 p.226

> "In the present case there was more than the mere circumstance that Motordom was in possession of the cars. It had for some time been trading in cars in its own name, both buying and selling them, and paying and being paid for them by cheques drawn by it or payable to it. Apart from any special knowledge that a particular person might have, any person dealing with Motordom who thought about it would naturally assume that that company was the owner or, if not the owner, had full authority to sell. By its course of conduct the plaintiff permitted these assumptions to be made. It invested Motordom with authority to sell in that manner and knew that it was doing so and, so far as the defendant was concerned, the plaintiff knew that the defendant had been dealing with Motordom in that manner. If it is necessary to find a duty owed to the defendant, as the Mercantile Bank Case indicates, the duty was owed to all persons, including the defendant, who might be likely to deal with Motordom. When the plaintiff revoked the authority which it had given, it did not take possession of the

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cars, as it was entitled to do under its arrangement with Motordom. It did not post any notice at the yards of Motordom. It did not inform the principal car dealers, such as the defendant, of the changed position. In these circumstances, I am of the opinion that the principles set out in the Eastern Distributors' Case require that the sale made by Motordom to the defendant should be held good as against the plaintiff."

Vol.1 pp. 221-227.

40. The Appellant submits that the analysis made by Walsh J. is consistent with that required by the true principles of estoppel by conduct, namely the determination of the issues:-

(a) What assumption did the Appellant make?

(b) What part had the Respondent played in occasioning the adoption of that assumption?

(c) Is it unjust or inadmissible to permit the Respondent to tender evidence for the purpose of proving a set of facts contrary to such assumption? Whether it is unjust or inadmissible will depend on whether in the circumstances the Respondent owed any relevant duty to the Appellant.

41. On the three issues propounded in paragraph 40 the Appellant makes the following submissions:

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(a) Walsh J. found that the Appellant assumed that Motordom had the capacity to deal with the cars as if it were the owner; this finding is supported by the evidence, and the probabilities tend strongly against any finding other than this inasmuch as the Appellant did not even query this point on the night in question.

(b) The part played by the Respondent in occasioning the adoption of this assumption is summarised in paragraph 15 and there was an express finding by Walsh J. in the Appellant's favour on this point.

(c) The existence of a duty or of circumstances rendering attempted disproof of the assumption unjust and inadmissible was

also confirmed by Walsh J. This finding was well founded upon the same material as that relevant to the issue in paragraph (b) and upon the further fact that Motordom had a large and active business in the purchase and sale of cars not only from and to members of the public but also from and to the Appellant, a dealer in cars.

42. The Appellant respectfully submits that in relation to these issues the approach taken by Walsh J. (in which McTiernan J. in the High Court concurred) is consistent with that which is appropriate to a question of estoppel; this approach involves an ascertainment firstly of the full significance of the apparent situation in order to determine the extent to which evidence may be tendered and admitted for the purpose of showing that the apparent situation is not the true situation. It is respectfully submitted that the majority of the High Court reversed the required process of reasoning in that the majority analysed in the first instance the true position and then proceeded to evaluate the evidence tending to establish the apparent situation. It is respectfully submitted that this process led the majority of the High Court to give insufficient weight to the part played by the Respondent in the creation of the apparent situation, that is to say in the creation of the assumption made by the Appellant when it bought the cars in question. In particular it is submitted that the respective views of Owen J. and Taylor J. quoted hereunder and which formed an important element for the respective decisions of Their Honours give insufficient weight to the evidence summarised in paragraph 15 of this Case. Taylor J. said:- Vol.1 p.233 Vol.1 p.241

"It is, of course, true that Webb, on behalf of Motordon, falsely represented that the vehicles which he purported to sell to the Respondent were Motordom's sole and absolute and unencumbered property and free from any charge or other adverse interest whatsoever and that no person or corporation had any right title or interest therein. But this was Webb's representation and there is not the slightest evidence to suggest that he was authorised by the Appellant to make the

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representation or to show that it was made with the latter's knowledge or consent."

Vol.1 p.246 Owen J. said:-

"Motordom professed to sell the cars as the owner of them but there is nothing in the evidence which would justify the conclusion that in the particular transaction with which this case is concerned the Plaintiff was privy to that representation."

SUBMISSION

43. The Appellant respectfully submits that the Vol.1 p.248 order of the High Court of Australia that the appeal from the Supreme Court of New South Wales be allowed with costs and that the verdict and judgment in favour of the Defendant on the Plaintiff's claim be set aside and the action be remitted to the Supreme Court for assessment of damages on that claim ought to be reversed and that this appeal should be allowed and the verdict and judgment of the Supreme Court Vol.1 p.229 restored, the Respondent being ordered to pay the costs of this appeal including the petition for special leave to appeal and the costs of the proceedings in the High Court.

REASONS OF APPEAL

44. The Appellant's reasons of appeal are:-

(a) That Section 28 (1) of the Sale of Goods Act (N.S.W.) should be held to confer upon the Appellant a title to the cars in question sufficient to preclude the Respondent from succeeding in this action for the alleged conversion of the said cars.

(b) That the Respondent is in the circumstances estopped from asserting against the Appellant that it was at the time of the transaction in question the owner of the cars acquired by the Appellant from Motordom.

(c) That the Respondent is in the circumstances estopped from asserting that the Appellant

did not derive from Motordom a valid title to the cars acquired by the Appellant from Motordom in the transaction in question.

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No. 43 of 1964

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE HIGH COURT OF AUSTRALIA

B E T W E E N:

PACIFIC MOTOR AUCTIONS PTY. LIMITED
Appellant

- and -

MOTOR CREDITS (HIRE FINANCE) LIMITED
Respondent

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