JAMAICA

IN THE COURT OF APPEAL

CIVIL APPEAL No. 6 of 1964

BEFORE: The Hon. Mr. Justice Henriques, President
The Hon. Mr. Justice Moody, J.A.
The Hon. Mr. Justice Luckhoo, J.A.

BETWEEN A.L.G. HENRIQUES) ..... PLAINTIFF/APPELLANTS
A.H. HENRIQUES)

AND UNITED DOMINIONS CORPORATION (JA.) LTD)
CHARLES B. MURRAY) DEFENDANTS/RESPONDENTS
HERMAN McMORRIS)
INSPECTOR EDDIE THOMAS)

Mr. V.O. Blake Q.C., and Mr. R.A. Mahfood for the appellants

Mr. Leacroft Robinson Q.C., and Mr. R.H. Williams for the first, second and third named respondents

25th, 26th, 27th, 28th Nov.; 1st, 2nd, 3rd, 4th, 5th, 10th Dec. 1969;
10th Feb. 1970

LUCKHOO, J.A:

On the 20th August, 1961, a Chevrolet motor car bearing registration number R. 3903 was in the possession of the second named appellant A.H. Henriques at premises occupied by his father A.L.G. Henriques, the first named appellant at Red Hills, Montego Bay, in the parish of St. James, when the first named respondents United Dominions Corporation (Ja.) Ltd., (hereinafter referred to as U.D.C.), claiming to be the owners of the car and to be entitled to possession of it, by their servants and/or agents the second and third named respondents Charles Murray and Herman McMorris entered upon those premises (hereinafter referred to as "the premises") and removed the car therefrom. The fourth named respondent Inspector of Police Eddie Thomas who had accompanied Murray and McMorris to the premises claimed to have done so in obedience to the orders of a superior officer and in the execution of his duty in order to prevent a breach of the peace but the appellants claimed that he entered the premises for the purpose of assisting Murray and McMorris in the removal of the car and did so assist them acting thereby maliciously and/or without reasonable

and probable cause. Subsequent to its removal from the premises U.D.C. sold the car to one Frater.

A.L.G. Henriques brought an action against the respondents claiming damages for trespass to land and to his goods, the latter claim being in relation to the removal of the lock of the door of the garage on the premises and the removal of the appellant's motor car in the course of the removal of the car R. 3903. A.H. Henriques claimed damages in trespass against each of the respondents, and as against U.D.C., Murray and McMorris an order for the return of the car or payment of its value £800 and damages for its detention, further, or alternatively damages for conversion. It was subsequently ordered that those actions be consolidated and proceed as one action and upon an order of a judge in chambers at the instance of U.D.C., a third party notice was served upon one Lascelles Simpson from whom U.D.C. claimed they had purchased the car. Simpson did not enter an appearance in the action and did not testify at the hearing. The claims of both appellants were dismissed. The appellants now appeal against the decision of the learned trial judge upon several grounds which involve a consideration of a number of difficult and interesting points.

The car a 1960 Impala Chevrolet had been imported into the Island on the 9th September, 1960 by a Mr. Nation through his agent a Mr. Gallimore. Three days later the car was sold by Gallimore on Nation's instructions to one Alfred Hugh Sam also known as Johnson L. Hugh and on the 15th September, 1960, it was first registered at the Kingston Tax Office in the name of Johnson L. Hugh with registration No. R. 622. On the 8th December, 1960, a substitute licence disc was issued in respect of the car to Hugh. On the 31st January, 1961, a transfer of the licence was registered from Hugh to Lascelles Simpson and on 17th May, 1961, the registration number of the car was changed to R.3903 on the application of Simpson who represented to the Collector of Taxes that he had lost one of the licence plates. On the 19th May, 1961, a transfer of the licence was registered from Simpson to K. Patterson of Montego Bay. On the 6th June, 1961, Patterson approached A.H. Henriques for a loan in the sum of £400 repayable in two weeks and offered the car as security therefor. A.H. Henriques inspected the car, its licence disc registered in the name of Patterson and a certificate of

insurance in Patterson's name in relation to the car and being satisfied that the car was Pattwrson's property and was a sufficient security for the loan requested, on the 6th June, 1961, loaned Patterson the amount of £400 repayable in two weeks and took the car in security for the loan. At the end of the period of two weeks Patterson did not repay the loan and it was agreed between them that the car should be sold for about £800. In pursuance of that agreement Patterson gave A.H. Henriques two transfers - one transferring the licence to him and the other signed in blank. A.H. Henriques made several unsuccessful attempts to sell the car which was kept at the premises of his father A.L.G. Henriques at Red Hills, Montego Bay where A.H. Henriques resided at that time.

In the meanwhile Simpson had on the 8th October, 1960, as a dealer in motor cars by letter bearing that date offered to sell the car to U.D.C., a finance company, representing to U.D.C. that he had a customer one George Palmer of 60 Barnett Street, Montego Bay who desired to purchase the car and was willing to enter into an agreement of hire purchase with U.D.C. on the terms and conditions contained in the agreement enclosed with the letter and had paid him a deposit of £483. 6. 8. The agreement purported to be signed by Palmer with the relevant particulars filled in was on one of the printed forms supplied by U.D.C. to Simpson under an existing arrangement between Simpson as dealer and U.D.C. as finance company whereby if someone desired to buy a motor car and was willing to enter into an agreement of hire purchase with U.D.C. in that regard Simpson would submit to U.D.C. for their consideration a hire purchase agreement signed by the prospective hirer containing the relevant particulars. Simpson as dealer would in the meanwhile accept a deposit from the prospective hirer. If U.D.C. decided to accept the hire purchase agreement they would buy the motor car from Simpson paying Simpson the difference between the cash price and the deposit, the deposit being retained by Simpson as part of the cash price. The hirer would then take possession of the car under the hire purchase agreement. There was a recourse agreement between Simpson and U.D.C. in the following terms -

> " In consideration of you, United Dominions Corporation (Jamaica) Ltd., from time to time entering into Hire Purchase Agreements covering merchandise sold by me to you, I, Lascelles Simpson,

hereby undertake and agree that if any such Hire Purchase Agreement shall be terminated for any reason whatsoever before you have received payment thereunder of all sums for which the Hirer is liable to you, I will upon receipt from you of notice of such termination or breach, repurchase the merchandise the subject of such Agreement by paying to you an amount equal to the full amount which would have been payable thereunder if the Agreement had not been terminated (less the rentals then paid) together with any expenses reasonably incurred by you in recovering possession of the said merchandise. I agree that this undertaking shall not be prejudiced or affected in any way by any time or indulgence shown to the Hirer. "

After receipt of Simpson's letter of the 8th October, 1960, with the enclosed hire purchase agreement U.D.C. decided to accept the agreement and to buy the car from Simpson. At the bottom of the hire purchase agreement sent by Simpson there appeared what purported to be the signature of Palmer acknowledging delivery of the car from U.D.C. On the 11th October, 1960, U.D.C. sent Simpson a cheque in the sum of £966.13s.4d which, with the sum of £483.6s.8d Simpson represented in his letter had been paid to him by Palmer as a deposit, made up the cash price for the car. Thereafter, in the months of January and February, 1961, Simpson sent U.D.C. two sums of money purporting to have been paid to him by Palmer in respect of instalments due under the hire purchase agreement. Not having received any further amounts in respect of instalments due under the hire purchase agreement U.D.C. purporting to act under the provisions of the hire purchase agreement decided to terminate the agreement and to re-possess the car. On the 24th July, 1961, Murray and McMorris who had discovered that the car was stored at the premises of A.L.G. Henriques went there for the purpose of repossessing the car on behalf of U.D.C. They were there informed by A.H. Henriques that he had taken the car as security for a loan of £400 made to Patterson. Murray told A.H. Henriques that the car was repossessed and would be removed on the following day. A.L.G. Henriques, who at that time was the Resident Magistrate holding a preliminary inquiry into charges laid by the police against Simpson for fraud committed on U.D.C. in relation to other motor cars - A.H. Henriques being engaged thereat as Simpson's legal representative - then intervened and said that he could not allow Murray to remove the car from his premises because it

would create a bad impression of him but would have his son give him an undertaking to deliver the car to U.D.C. in Kingston on production of the hire purchase agreement relating to the car. At the request of A.H. Henriques, Murray and McMorris accompanied him to Patterson where A.H. Henriques informed Patterson that Murray and McMorris were claiming that the car was the subject of a hire purchase agreement with U.D.C. Patterson said that he knew of no hire purchase agreement in respect of the car which he claimed to have bought from Simpson. He promised that he would try to repay A.H. Henriques the loan of £400 on the following day. A.H. Henriques told Murray and McMorris that he would hold the car until the loan was repaid. A.L.G. Henriques then persuaded his son to give a written undertaking which he helped to frame by which A.H. Henriques undertook to deliver the car to U.D.C. on production of a hire purchase agreement establishing their ownership thereto. Patterson did not repay the loan as promised and on the 10th August, 1961, Murray showed A.H. Henriques photostatic copies of the hire purchase agreement purporting to be signed by Palmer and of the accompanying letter from Simpson to U.D.C. offering to sell them the car.

By that time A.H. Henriques had made searches at the Tax Office and otherwise which traced the registered ownership of the car from the time of its arrival in Jamaica. Further, enquiries by Murray had led him to the conclusion that Palmer never did exist and this he disclosed to A.H. Henriques with the observation in relation to the hire purchase agreement "Yes, it is a bogus transaction". A.H. Henriques then told Murray that in view of that he could not give up the car until he was repaid the loan made to Patterson.

On the 20th August, 1961, Murray and McMorris accompanied by Inspector Eddie Thomas went to A.L.G. Henriques' premises to seize the car. The car had been locked up in A.L.G. Henriques' garage by A.H. Henriques on the advice of A.L.G. Henriques with a view to preventing seizure by U.D.C. When Murray, McMorris and Thomas arrived at A.L.G. Henriques' premises, A.L.G. Henriques was away from the district. A.H. Henriques arrived there some time later. On his arrival Murray told him that they had come for the car and asked him to unlock the garage door so that they could remove

the car. A.H. Henriques said he did not have the keys. Murray and McMorris thereafter removed the lock from the garage door with the aid of a screwdriver which they procured. A.H. Henriques then drove two cars which were on the premises and parked them in front of the garage door, turned up the window glasses, locked them and put the car keys in his pocket. Murray's request that the cars be removed was refused by A.H. Henriques. One of the cars belonged to A.L.G. Henriques. Murray then opened a front window of that car with the screwdriver and bridging the wires of the ignition switch he removed that car from in front of the garage in order to permit the Chevrolet car to be removed from the garage. This was duly accomplished and the lock was replaced on the garage door. The Chevrolet car was then driven away by McMorris. The first question to be determined is whether there was a contract of sale between U.D.C. and Simpson in respect of the car. It was submitted on behalf of the appellants that as Palmer was a fictitious person Simpson in obtaining the sum of £966.13s.4d. from U.D.C. committed the offence of larceny by a trick and that therefore no contract of sale ever came into existence. It is clear that U.D.C. were induced to part with their money by reason of the false representations made by Simpson that Palmer was an existing person desirous of entering into the hire purchase agreement sent them on the terms and conditions contained therein and that Palmer had paid a deposit of £483. 6. 8. They were so induced to part not only with possession but also with the property in the money and indeed at all material times believed that there was in existence a contract of sale and purchase whereby the property in the car passed to them when they accepted Simpson's offer of the 8th October, 1960. I do not think that in those circumstances the offence of larceny by a trick was committed but rather that it is a case of obtaining money by false pretences. It was also urged on behalf of the appellants that in any event no contract of sale between U.D.C. and Simpson could come into existence because the existence of a real person to enter into a transaction of hire purchase with U.D.C. was a condition precedent to the formation of a binding contract of sale between Simpson and U.D.C. in respect of the car. While Simpson's false representations to U.D.C. induced U.D.C. to accept Simpson's offer to sell them the car this is not

a case where the representations relate to the essential nature of the agreement which was entered into by U.D.C. with Simpson so as to render the agreement void ab initio on the ground that U.D.C.'s mind did not accompany their outward act. In my view there was a contract of sale of the car existing between Simpson and U.D.C. voidable by U.D.C. on the ground of Simpson's fraudulent misrepresentations.

It was also urged on behalf of the appellants that if there was a voidable contract in existence it could only operate as an agreement to sell the car as the property in the car in October, 1960, was in someone other than Simpson, namely Johnson L. Hugh who had purchased the car in September, 1960 from the original owner in Jamaica Mr. Nation, the car being registered at that date under the provisions of s.10 of the Road Traffic Law, Cap. 346 in Hugh's name as owner. If there was only an agreement to sell the car the property in the car did not pass to U.D.C. in October, 1960. Counsel to the appellants contended that the registration book relating to the car though not a document of title is the best evidence of ownership of the car (as neither Hugh nor Simpson gave evidence at the trial) and in support of this contention he cited the cases of Bishopsgate Motor Corporation v Transport Brokers, Ltd., (1949) 1 All E.R. 37 per Denning L.J. at p.46 and Pearson v Rose & Young (1950) 2 All E.R. 102 per Denning L.J. at p. 1033; cf Central Newbury Car Auctions, Ltd., v Unity Finance, Ltd., (1957) 1 Q.B. 371 C.A. where Hodson & Morris L.JJ do not appear to share that view. Further, counsel urged, as there was no evidence that prior to the 31st January, 1961, Simpson was ever in possession of the car and indeed there was evidence that up to the end of November, 1960, Hugh had been seen driving the car and had been issued on 8th December, 1960 with a substitute licence disc, it could not be urged that there was any evidence that Simpson had title, possessory or otherwise, to confer on U.D.C. in October, 1960. The learned trial judge was of the view that these matters relied on by counsel for the appellants did not necessarily mean that Simpson could not have been the legal owner of the car on the 8th October, 1960, but that it was quite probable that the transaction whereby he became the legal owner would have taken place before 31st January, 1961, though there was no evidence to show when he actually acquired the legal ownership.

Simpson to represent to U.D.C. and he did so represent to U.D.C. that the property in the car would pass from him to U.D.C. on the latter's acceptance of his offer and the payment of the sum of £966.13s.4d and that representation was acted upon by U.D.C. As the matter stood at the 31st January, 1961, Simpson could not be heard to aver otherwise. There is therefore no room for the application of the provisions of s.19 of the Sale of Goods Law, Cap 349 (which relates to rules for ascertaining the intention of the parties as to the times at which the property in goods is to pass to the buyer).

When the property in the car was transferred to Simpson on the 31st January, 1961, he held the car in trust for U.D.C. who had given valuable consideration and the property therein vested in U.D.C. cf Tailby v Official Receiver (1888) 13 App. Cas. 523, and In re Lind : Industrials Finance Syndicate, Ltd v Lind (1915) 2 Ch.D 345 C.A. which relate to contracts for the sale of future acquired property. In referring to those cases I have not overlooked what was stated in the judgment of Atkin L.J. in In re Wait (1927) 1 Ch.D. 606 C.A. in relation to the question of equitable principles being imported into the transfer of property otherwise than in accordance with the code regulating the sale of goods. Such a conclusion involves no importation of any equitable principle not included in the code for Simpson represented to U.D.C. that he was the owner of the car and had delivered it to Palmer under the terms of the hire purchase agreement and that U.D.C. would become the owner of the car upon payment of £966.13s.4d. (which with the deposit represented to have been paid by Palmer made up the full purchase price) and U.D.C. believed and acted upon those representations. It is indeed an application of the provisions of section 18 of the Sale of Goods Law Cap. 349 which provide that where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred and that for the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case. It is true that in October, 1960, Simpson not having yet acquired the legal ownership could not transfer it to U.D.C. and in that regard the contract remained executory. But it nevertheless crystallised into a sale

immediately upon Simpson's acquisition of the legal ownership in the car.

So that at the 31st January, 1961, before Patterson and A.H. Henriques came into the picture the property in the car was in U.D.C. Actual physical possession of the car, however, remained with Simpson though this was not in any true sense with the consent of U.D.C. who ~~believed~~ relied upon Simpson's representation to that effect (in the hire purchase agreement sent with his letter) that possession of the car had been given to Palmer.

On behalf of the appellants it was submitted that in the light of the trial judge's finding that A.H. Henriques had bona fide and for value taken the car in pledge from Patterson his possession was protected by the provisions of s.25 (1) of the Sale of Goods Law, Cap 349 unless the respondents could show that Patterson had taken the car from Simpson with notice of the sale by Simpson to U.D.C.

Section 25(1) of that Law provides as follows -

> " 25. - (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 his duly appointed 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. "

Counsel's submission places the onus of proving .. .. ..notice by Patterson of the prior sale to U.D.C. upon the respondents. Patterson did not testify at the hearing.

The learned trial judge held that U.D.C. could assert their rights of ownership and possession in the car against A.H. Henriques for two reasons -

> (i) On the sale by Simpson to U.D.C., Simpson continued in possession as bailee for the purpose of delivering possession to Palmer and consequently the provisions of s.25 (1) of Cap. 349 would not apply as they were applicable only where a seller continued or was in possession in his capacity of seller;

(ii) the onus of proof under s.25(1) lay on the person relying on that subsection, A.H. Henriques, who had failed to prove either that Patterson was a duly appointed agent of Simpson or alternatively, that Patterson had received the car from Simpson under a sale, pledge or other disposition in good faith and without notice of the sale by Simpson to U.D.C.

In respect to the first of those two reasons the learned trial judge, whose judgment was delivered on the 27th January, 1964, relied on the judgments in the cases of Staffs. Motor Guarantee, Ltd v. British Waggon Co. Ltd (1934) All E.R. Rep. 322, Olds Discount Co. Ltd., v. Krett & Krett (1940) 3 All E.R. 36, and Eastern Distributors, Ltd. v Goldring (Murphy, Third Party) (1957) 2 All E.R. 525. However, the Privy Council has subsequently held in Pacific Motor Auctions Pty., Ltd v Motor Credits (Hire Finance), Ltd (1965) 2 All E.R. 105 that the words "continues or is in possession of the goods" (in s.28 (1) of the New South Wales Sale of Goods Act, 1923 to 1953, the counterpart of s.25(1) of the corresponding Jamaica Law and of s.25 (1) U.K. Sale of Goods Act, 1893) were intended to refer to the continuity of physical possession regardless of any private transactions between the seller and the purchaser which might alter the legal title under which the possession might be held. It is clear therefore that the first reason advanced by the learned trial judge for holding against the appellants on this point cannot be supported.

As to the second reason advanced by the learned trial judge it was submitted by counsel for the appellants that under s. 25 (1) of the Sale of Goods Law, Cap 349, it was for U.D.C. to show either that Patterson was not a duly appointed agent of Simpson or alternatively that Patterson had received the car from Simpson under a sale, pledge or other disposition otherwise than in good faith or with notice of the sale by Simpson to U.D.C., in effect that they had not authorised the pledging of the car to A.H. Henriques. Counsel said that there appeared to be no decided case dealing with the question of onus of proof under s. 25 (1) but assistance in deciding this question might be gained by a consideration of the judgments of the Court of Appeal in Whitehorn Bros. v Davison (1911) 1 K.B.463 where it was held that under s.23 of the Sale of Goods Act, 1893, (a provision identical in terms with s.23 of the Sale of Goods Law, Cap 349) the onus lies on the seller who seeks to avoid the sale and to recover the goods

from a pledgee of proving that the pledgee took the chattel with notice of fraud practised by the buyer on the seller or otherwise than in good faith. Section 23 of Cap 349 provides as follows -

> " 23. When the seller of the goods has a voidable title thereto but this title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title. "

Counsel puts his argument on this point in the following way. What s.23 does is to provide that a person deriving title from a seller shall obtain a good title in certain circumstances although at common law his title would have been of no avail against the true owner. Furthermore, s23 confers the right subject to a proviso which would tend to indicate that the person claiming title under the section would have to show that he came within the proviso. Nevertheless the Court of Appeal in England has held that the onus under the section rests on the owner of the goods who is endeavouring to establish his title to the goods. If that decision is correct and is to be followed then this reasoning a fortiori applies to s.25(1) which is also designed to protect third parties deriving title not merely by a sale but extends to a pledge or other disposition. Furthermore, the conditions for the application of s.25(1) are not expressed in the form of a proviso but say that in the enumerated circumstances the delivery or transfer is deemed to be expressly authorised by the owner of the goods. In s.25 the legislature is giving protection to an innocent transferee against the true owner. This is the only approach that can fulfil the true purpose of s.25 - that is to say, to debar the true owner from recovering goods from innocent purchasers or pledgees in circumstances in which a transfer and the sale, pledge or other disposition has occurred because the true owner has left the goods in the possession of the seller thereby allowing the seller the opportunity to deal with the goods. In the instant case A.H. Henriques has shown that Patterson was a prima facie owner by virtue of his name appearing in the Register of Motor Vehicles upon transfer from Simpson. The true owner (U.D.C.) in establishing title against an innocent pledgee for value (A.H. Henriques) from a person who was the prima facie owner (Patterson) must show inter alia that the prima facie owner was not

the true owner and did not receive a transfer which the true owner authorised in terms of s.25 (1).

I do not think that anything said by the learned Lord Justice in Whitehorn Bros v Davison (ubi sup) on the question of the onus under s.23 of the 1893 Act is applicable to the question to be decided under s.25 of Cap. 349. In a case under s.23 there is in existence a contract of sale which though voidable is valid until avoided. This appears to be at the very core of the reasoning which impelled the learned Lord Justices to hold as they did that the onus under s.23 must lie on he who seeks to impeach that which up to that time is a valid contract. In a case under s.25(1) the seller, once having sold the goods cannot enter again into a valid contract of sale, pledge or other disposition of the same goods unless he is so authorised by the owner and it is only in the circumstances specified in that subsection that he is deemed to be expressly authorised by the owner to do so. The person receiving the property gets no valid delivery or transfer apart from the subsection and must prove the things necessary to give him valid delivery or transfer as specified in the subsection. In this regard I think that the case of Heap v Motorists' Advisory Agency, Ltd (1923) 1 K.B. 577 per Lush, J. at p.590 on the question of the onus under s.2(1) of the Factors Act, 1889 distinguishing Whitehorn Bros. v Davison (ubi sup) is in point. In Pacific Motor Auctions Pty., L+d v Motor Credits (Hire Finance) Ltd (ubi sup) Lord Pearce in delivering the opinion of the Privy Council (See (1965) 2 All E.R. at p.108 letters E-F) appears also to have taken the view that the onus under a like provision in the relevant New South Wales legislation is on the person receiving the property from the seller.

If, as I hold, the onus under s.25(1) of Cap 349, is on A.H. Henriques to show that Patterson received the car in good faith from Simpson and without notice of the prior sale to U.D.C., then on the state of the evidence adduced it cannot be said that this onus has been discharged.

However, it was urged that A.H. Henriques as a bona fide pledgee for value without notice of the sale to U.D.C. ought not to suffer as against U.D.C. where the latter has carelessly allowed Simpson to remain in possession of the car. While this contention was advanced as part of the

argument in respect of the onus under s.25(1) of Cap.349 it is perhaps more appropriate to regard it as an argument to the effect that U.D.C. has so acted as to estop them from setting up their title in answer to the claim of the appellants. Some support for such an argument is to be found in the opinion of the Privy Council in Commonwealth Trust, Ltd., v Akotey (1926) A.C. 72. In that case as the headnote to that report discloses "the respondent, a grower of cocoa in the Gold Coast Colony, there consigned by railway 1050 bags of cocoa to L., to whom he had previously sold cocoa. Before a difference as to the price had been settled, L. sold the cocoa to the appellants and handed the consignment notes to their agent, who re-consigned the cocoa to the appellants. The appellants bought in good faith and for the full price. The respondent sued the appellants in the Colony for damages for conversion." Lord Shaw in delivering the opinion of the Privy Council examined the facts and having expressed the view that no contract of sale had been completed at the material date said (at p. 76) -

> " It was further argued before their Lordships that although the property in the cocoa had not passed from the respondent, yet that the respondent had so acted as to estop him from setting up his title in answer to the claim of the appellants. Reliance was placed on the well-known statement of Ashhurst J. in Lickbarrow v Mason (1787) 2 T.R. 63, 67, "that wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it." Their Lordships are clearly of opinion that the present is a plain case for the application of that principle. There is no kind of specialty in this case such as occurred in Farquharson Bros. & Co. v. King & Co. (1902) A.C. 325, the parallel to which would be that the goods were delivered to Laing by the fraudulent act of respondent's agent: the goods were in fact delivered over to Laing by the direct act of the respondent himself.
>
> To permit goods to go into the possession of another, with all the insignia of possession thereof and of apparent title, and to leave it open to go behind that possession so given and accompanied, and upset a purchase of the goods made for full value and in good faith, would bring confusion into mercantile transactions, and would be inconsistent with law and with the principles so frequently affirmed, following Lickbarrow v Mason. "

In Farquharson Bros. & Co., v King (1902) A.C. 325 as the headnote to that report states "the appellants, who were timber merchants, warehoused with a dock company the timber they imported, and instructed the dock company to accept all transfer or delivery orders signed by their clerk. The clerk had their authority to make limited sales to their known customers. The clerk under an assumed name fraudulently sold timber of the appellants to the respondents who knew nothing of the appellants or of the clerk under his real name, and who bought and paid the clerk for the timber in good faith. The clerk carried out the sales by giving the dock company orders for the transfer of timber in his assumed name, and then in that name giving delivery orders to the respondents." It was held by the Privy Council that the appellants, not having held out the clerk to the respondents as their agent to sell to the respondents, were not estopped from denying the clerk's authority to sell; that the clerk, having no title or apparent authority himself, could not give the respondents any title; and that the appellants were entitled to recover from the respondents the value of the timber. The real defence in that case as observed by Lord Macnaghten in his opinion at p.335 came to this -

> " The defendants say to the plaintiffs. 'You Messrs Farquharson, have conducted your business in such an unbusinesslike way that you ought not to have your own goods back again. This misfortune common to you and to us is all your fault. By your foolish confidence in Capon and by the written authority you gave him, you 'enabled' him to commit this fraud upon us. And so Ashhurst J.'s famous dictum comes in and you must sustain the loss.' "

A similar argument was urged on behalf of the appellants in the instant case. Lord Macnaghten, as indeed the other law lords, rejected such a defence as having no foundation in principle or authority.

Lord Lindley in his opinion at p.342, stated -

> " It is, of course, true that by employing Capon and trusting him as they did the plaintiffs enabled him to transfer the timber to anyone; in other words, the plaintiffs in one sense enabled him to cheat both themselves and others. In that sense everyone who has a servant enables him to steal whatever is within his reach. But if the word 'enable' is used in this wide sense it is clearly untrue to say, as Ashhurst J. said in Lickbarrow v Mason 'that whatever one

> of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it.' Such a doctrine is far too wide; and the cases referred to in the argument and commented on by Vaughan-Williams, L.J., show that it cannot be relied upon without considerable qualification .....
> .....
> So far as I know, the doctrine has never been judicially applied where nothing has been done by one of the innocent parties which has in fact misled the other: See Story on Agency, s.133. "

In concluding his opinion Lord Lindley at p.343 put the matter this way -

> " In the present case, in my view of it, Capon simply stole the plaintiff's goods and sold them to the defendants, and the defendants' title is not improved by the circumstance that the theft was the result of an ingenious fraud on the plaintiffs and on the defendants alike. The defendants were not in any way misled by any act of the plaintiffs on which they placed reliance; and the plaintiffs are not, therefore, precluded from denying Capon's authority to sell ".

In Mercantile Bank of India, Ltd v Central Bank of India Ltd (1938) A.C. 287, Lord Wright in delivering the opinion of the Privy Council after referring to the decision of the Board in Commonwealth Trust Ltd., v Akotey (ubi sup) and to that part of the opinion of Lord Shaw extracted above said (at pp. 298-300) -

> " What is there stated, it may be, would cover this case if it is applied without qualification. But, in their Lordships' judgment, it is impossible to accept without qualification as a true statement of law the principles there broadly laid down. It may well be that there were facts in that case not fully elucidated in the report which would justify the decision; but on the face of it their Lordships do not think that the case is one which it would be safe to follow. This was, it seems, the opinion of Lord Sumner, who, in a striking instance of a case where estoppel by conduct or representation was negatived, the case of R.E. Jones, Ld v. Waring & Gillow, Ld. (1926) A.C. 670 said at p.693: 'There was no duty between Jones, Ld., and Waring & Gillow, Ld., and, without that, the wide proposition of Ashhurst J. in Lickbarrow v Mason would not apply (see observations of Lord Macnaghten and Lord Lindley in Farquharson Bros. & Co. v. King & Co. (ubi sup) at pp. 335, 342)) and of Lord Parmoor in London Joint Stock Bank v. Macmillan (1918) A.C. 777 at p.836, which were apparently over-

looked in Commonwealth Trust v. Akotey'. Lord Sumner thus puts the principle of estoppel as depending upon a duty. The passage to which he refers in Lord Parmoor's speech in the London Joint Stock Bank v. Macmillan and Arthur (ubi sup) pointed out that the rule expressed by Ashhurst J. was too wide, and said that the accurate rule was stated by Blackburn J. in Swan v. North British Australasian Co. (1863) 2 H & C, 175. There Blackburn J. referring to the judgment of Wilde B. in the Court below, said (p.182): 'He omits to qualify it (the rule he has stated) by saying that the neglect must be in the transaction itself, and be the proximate cause of the leading the party into that mistake; and also, as I think, that it must be the neglect of some duty that is owing to the person led into that belief, or, what comes to the same thing, to the general public of whom the person is one, and not merely neglect of what would be prudent in respect to the party himself, or even of some duty owing to third persons, with whom those seeking to set up the estoppel are not privy. '

To the same effect in Farquharson Bros. & Co. v. King & Co. (ubi sup) Lord Lindley said at p.342: 'It is, of course, true that by employing Capon (the fraudulent clerk) and trusting him as they did the plaintiffs enabled him to transfer the timber to any one; in other words, the plaintiffs in one sense enabled him to cheat both themselves and others. In that sense, every one who has a servant enables him to steal whatever is within his reach. '

Lord Lindley then pointed out that the dictum of Ashhurst J. is too wide. This has been pointed out by other judges. It was, indeed, not necessary to the decision of the case which was before Ashhurst J. The case of Commonwealth Trust v. Akotey (ubi sup) is also inconsistent with Johnson v. Credit Lyonnais Co. (1877) 3 C.P.D. 32, where it was held that the conduct of the plaintiff, in leaving the dock warrants, which were the indicia of title, in the hands of a vendor of the goods after he had been paid by the plaintiff as purchaser, without any change being made in the books of the dock company, did not disentitle the plaintiff from claiming for conversion against the defendants, who, in good faith, made advances to the fraudulent vendor on the security of the dock warrants thus left in his hands. In one sense the plaintiff, by leaving the indicia of title in the vendor's hands, had enabled him to defraud the defendants; but it was held by the Court of Appeal that, in the words of Cockburn C.J. at p.36: 'The case for the plaintiff rests on the general proposition of law - which as a general proposition cannot be contested - that the mere

possession of the property of another, without authority to deal with the thing in question otherwise than for the purpose of safe custody, as was the case here, will not, if the person so in possession takes upon himself to sell or pledge to a third party, divest the owner of his rights as against the third party, however innocent in the transaction the latter party may have been. '

The Chief Justice adds that if it were held that in such a case there was an estoppel, the Factors Acts, which give a limited protection in certain cases to the unauthorized sale of goods, would have been unnecessary. In their Lordships' judgment, it cannot be said that the respondents owed any duty to the appellants in the matter. There was no relationship of contract or agency. They had no reason to think that the documents would ever be handed to the appellants. Mr. Miller's contention that estoppel does not depend on the existence of a duty is, in their Lordships' judgment, refuted by the authorities already cited and many other like authorities which it is not necessary to cite. "

Lord Wright went on to observe (at pp 301, 302) that it is only in special conditions of fact that an estoppel by representation can be established and that there are very few cases of actions for conversion in which a plea of estoppel by representation has succeeded. And at p. 303 -

"The railway receipt, though a document of title, was in form merely an authority to take delivery of the goods, and the possession of such a document contained no representation that the holder had any implied authority or right to dispose of the goods. It was at best an ambiguous document. Its possession no more conveyed a representation that the merchants were entitled to dispose of the property than the actual possession of the goods themselves would have conveyed any such representation. It is not like a negotiable instrument."

It was conceded in the instant case that the registration book is not a document of title.

These cases were all discussed or referred to in the judgments of the Court of Appeal in Central Newbury Car Auctions Ltd v. Unity Finance Ltd (1957) 1 Q.B. 371. I do not understand any of those judgments as questioning any of the principles stated in Lord Wright's observations in the Mercantile Bank of India case and if those principles are applied in the instant case it seems clear that here there was no estoppel operating against U.D.C. by representation. U.D.C. never intended to part with the property in the car and the fact that they did not cause a transfer to be effected in their

name in the Registration Book which was kept in the office of the Licensing Authority (there was at that time no issue of a registration book to the registered owner of a car) did not amount to estoppel by conduct for I do not think that it can fairly be said that U.D.C. at any time behaved as if they had parted with the property in the car to Simpson.
There was no duty on U.D.C. towards Patterson or any other person to have a transfer made in their name in the Registration Book even though such a transfer was required by law for excise purposes.

So as the matter stood at the 26th August, 1961, U.D.C. remained the legal owners of the car and were entitled to possession of it. A.H. Henriques could not seek to retain possession of the car even though Patterson had failed to repay him the loan. U.D.C. was entitled to retake possession of the car from A.H. Henriques and did so using no more force than was necessary in the circumstances. The claim of that appellant must therefore fail.

In so far as the claim of A.L.G. Henriques is concerned the question of the right of the owner of an article to enter the premises of a third person to retake possession of the article left there by a trespasser was much debated. It was contended on behalf of the appellants that it is a fundamental constitutional principle that every invasion or physical interference with land is trespass to land unless the person invading or interfering with the land can show that he is empowered or excused by some positive law - either statutory or common law. In the circumstances of the instant case there is no rule of law that has been established in 300 or 400 years of litigation to justify the invasion by the respondents that took place.

After referring to the opinions contained in a number of text-books on the subject and more especially to the judgment of Tindal C.J., in the case of Anthony v. Haney (1832) 8 Bing. 181; 131 E.R. 372 counsel submitted that from an examination of the authorities referred to it emerges -

(i) that the question of law as to the extent of the right of recaption on the land of an innocent third party has not been clearly settled by authority;

(ii) that the better view appears to be that an entry on land is only justifiable in case of pursuit of a criminal who has stolen the goods, or alternatively, where the occupier of land wrongfully acquires possession of the goods and is a trespasser in relation thereto.

In support of those submissions counsel put his argument in this way: although the right of entry on land to recapture chattels has been considered since the days of Blackstone at least it has never yet been established in any authoritative way that there is a right to enter the premises of an innocent third party merely because he refuses to deliver possession to the owner. Blackstone's statement of the law never recognised the right being claimed in the instant case and in so far as it can be discovered from the opinion of textbook writers and judges and various obiter dicta the better opinion appears to be that in circumstances such as the present the owner of goods should not take the law into his own hands. That view is eminently correct. If a contrary view is taken it leads to the ridiculous situation that complicated questions of law which can occupy the earnest attention of lawyers and judges must be answered instantly by hire purchase seizers and laymen innocently in possession of goods on premises. Because when a demand is made for recapture the owner of the premises must either decide questions of title or fight for the defendant's property or give up his proprietary rights. The alternative to that situation is to require the claimant to establish his claim in court. After all these years the limits of the right to enter the property of an innocent third party should not be extended.

This broad general statement contains much that commends itself to commonsense. However, before seeking to apply it to the instant case it is necessary to see what are the particular facts and circumstances relied upon by the respondents in justification of their entry upon the premises and of the acts done by them at the material time. In this connection counsel for the respondents has attracted our attention to the following matters. On the 24th July, 1961, A.H. Henriques acting on the advice and with the assistance of A.L.G. Henriques gave a written

undertaking to U.D.C.'s agents to deliver the car on production of a hire-purchase agreement establishing U.D.C.'s ownership to the car. That undertaking was given following upon the agents' visit to the premises for the purpose of taking away the car and their informing the appellants that the car was repossessed. The car was not taken away on that day out of deference, as the trial judge found, to A.L.G. Henriques who at that time was the Resident Magistrate holding a preliminary inquiry into charges of fraud alleged to have been committed by Simpson against U.D.C. involving motor cars and whose son A.H. Henriques a barrister at law was then the legal representative of Simpson at the inquiry. A.L.G. Henriques had admitted that had the agents insisted on taking away the car on the 24th July, 1961, he would not have attempted to stop them from doing so. Thereafter A.L.G. Henriques made certain enquiries into the previous history of the car and as a result decided that U.D.C. had not established ownership of the car. Thereafter A.L.G. Henriques was instrumental in having the car locked up in his garage with a view, as the trial judge found, to prevent U.D.C. seizing it. Counsel for the respondents has urged that A.L.G. Henriques is not an innocent third party as his counsel contends but rather has placed himself in the position of a wrongdoer in relation to the car by having the car locked up in his garage to prevent seizure by U.D.C. thereby committing at least a trespass in relation to the car. Counsel urged that A.L.G. Henriques in fact was guilty of conversion because he was denying U.D.C.'s ownership in claiming then as he still does that U.D.C. was not entitled to the ownership or possession thereof.

I think that in the light of the facts and circumstances proved or admitted in evidence it is not an unreasonable inference that at the 20th August, 1961, both A.L.G. Henriques and A.H. Henriques had decided that U.D.C. were not the owners of the car and that as a result the car was parked in A.L.G. Henriques' garage at the instigation of A.L.G. Henriques in order to prevent U.D.C. seizing the car. Whatever might have been A.L.G. Henriques' position before this latter act took place both appellants were now engaged in a joint enterprise which involved not only a dealing with the car in a manner inconsistent with U.D.C.'s owner-

ship and right to immediate possession thereof but also an intention in so doing to deny U.D.C.'s right of ownership and right to immediate possession and the assertion of a right in A.H. Henriques to retain possession inconsistent with U.D.C.'s rights. A.L.G. Henriques like A.H. Henriques was guilty of conversion and so U.D.C. could lawfully enter upon his premises and remove the car just as if he were an original tortfeasor.

Counsel for the appellants also challenged the correctness of the acceptance by the learned trial judge of the evidence given by the respondent Thomas. Having examined counsel's submissions in this regard I do not think that the learned trial judge was shown to have reached an unreasonable conclusion.

On the facts of the case the claim of A.L.G. Henriques in trespass must fail.

I think that the learned trial judge came to the right conclusion in dismissing the claim of both appellants.

I would dismiss the appeal of both appellants affirming the judgment in the court below with costs in this court to the first, second and third named respondents. The fourth named respondent not having taken part at the hearing of this appeal, there will be no order as to costs of this appeal made in relation to him.

I agree.

I agree.

I think that there is much force in counsel's contention that in the light of the subsequent discovery of frauds of a similar nature perpetrated by Simpson upon U.D.C. in relation to motor cars which at no time were in the ownership of Simpson, it was more probable than not that in October, 1960 Simpson was not the legal owner of the car. However, it is necessary to see if, as found by the learned trial judge, the property in the car passed to U.D.C. when Simpson became the legal owner of the car. The learned trial judge held that the later acquisition by Simpson of the legal ownership of the car went to "feed" the contract of sale between Simpson and U.D.C., whereby the legal ownership vested in U.D.C. at least from the 31st January, 1961.

It was submitted by counsel for the appellants that if Simpson did not become the legal owner of the car until the 31st January, 1961, the contract between Simpson and U.D.C. was at most an agreement of sale and the property in the car could not pass to U.D.C. unless and until Simpson delivered the car to U.D.C. or otherwise appropriated it to him or U.D.C. took possession of it by authority of Simpson. It was contended that none of these events ever took place and therefore the property in the car at no time passed to U.D.C. In the course of his testimony Mr. Distant, Collection manager of U.D.C. stated that in the months of January and February, 1961 Simpson sent U.D.C. two sums of money £47.10.7, and £61, respectively purporting to have been received by him from the hirer Palmer in respect of rentals due under the hire purchase agreement. Counsel for the appellants contended that this evidence is not admissible to prove the truth of what the witness stated and that it could not therefore be urged on behalf of U.D.C. that there was evidence of appropriation of the car by Simpson to U.D.C. I do not think that it is necessary to decide this point in view of the conclusion I have otherwise reached that U.D.C. did not become the owner of the car at least from the 31st January, 1961. In that connection it is important to note that the agreement entered into between Simpson and U.D.C. for the sale of the car was not for the sale of a car to be acquired by Simpson at some time in the future but rather for the sale of a specific car which Simpson represented to be in his ownership at the date of the offer the 8th October, 1960. It was clearly intended by