

[IN THE COURT OF APPEAL.]

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OPPENHEIMER v. FRAZER & WYATT AND ANOTHER.

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March 21, 22,
25.

Factor—Mercantile Agent—Possession of Goods—Consent of Owner—Larceny by a Trick—Person taking in Good Faith under Disposition by Mercantile Agent—Purchase on Joint Account—Bad Faith on part of One of Two Joint Purchasers—Factors Act, 1889 (52 & 53 Vict. c. 45), s. 2, sub-s. 1.

Where a mercantile agent, who is in possession of goods with the consent of the owner, makes, without the authority and in fraud of the owner, a sale of them to joint purchasers, who act as partners in the particular transaction of the purchase of them as a speculation, and one of the joint purchasers does not act in good faith, the other joint purchasers, although they personally act in good faith, are not within the protection given by the Factors Act, 1889, s. 2, sub-s. 1.

Semble, where the circumstances under which a mercantile agent has obtained possession of goods from their owner are such as to render him guilty of larceny by a trick, he cannot be said to be in possession of the goods with the consent of the owner within the meaning of the above-mentioned section.

Decision of Channell J., [1907] 1 K. B. 519, in part reversed.

APPLICATIONS, by the plaintiff and one of the defendants respectively, for judgment or a new trial as after mentioned, in an action tried by Channell J. with a jury. (1)

The action was brought against a firm called Frazer & Wyatt and one Broadhurst for the recovery of certain parcels of diamonds, or damages for their conversion.

The defendants in their defence relied upon the provisions of the Factors Act, 1889, s. 2, sub-s. 1.

The facts, as appearing from the evidence, so far as material to the points of law in respect of which the case is reported, may be stated as follows :—

The plaintiff, who was a diamond merchant, parted with the possession of a number of parcels of diamonds belonging to him to one Schwabacher, a diamond broker, under the following circumstances. Schwabacher came to the plaintiff in the month of April, 1906, and represented that he knew certain firms carrying on business in the diamond trade, named respectively Pinto Leite & Nephews and Edward Kellers, who were likely to be customers for the plaintiff's diamonds. The plaintiff stated in

(1) See [1907] 1 K. B. 519.

evidence that, in consequence of that representation, on that occasion and on subsequent occasions before the end of October, 1906, he handed parcels of diamonds, to the aggregate value of between 30,000*l.* and 40,000*l.*, to Schwabacher to deal with, instructing him to offer them only to the firms so mentioned at certain prices. It appeared from the evidence that it is the usual course of business in the diamond trade that, when diamonds are entrusted to a diamond broker for sale on commission, a price is given him, and, if he can get that price, then he delivers the parcel to the purchaser and completes the sale; but if he cannot get that price, but can get an offer of a lower price which he considers reasonable, he can do what is called "take a seal," that is, place the diamonds in an envelope, which is sealed by the prospective buyer, with the price offered by him written upon it. The offer is then submitted to the owner of the diamonds, and if he accepts it the business is concluded, but if he does not the seal is broken, the object of this practice being that, while the negotiations are pending, the seller shall not be able to try to get a better price from another buyer elsewhere. Schwabacher from time to time reported to the plaintiff sales of diamonds as being made to the above-mentioned firms at the prices asked by the plaintiff; and in many cases he brought back to the plaintiff "seals," i.e., parcels of diamonds sealed up as before mentioned in envelopes, with lower prices written upon them, which purported to be offered by one or other of the firms; and, those prices being accepted by the plaintiff, the diamonds were left in Schwabacher's possession for the purpose of being delivered in pursuance of the supposed bargain. This had occurred in respect of some of the diamonds which were the subject of the action. Schwabacher from time to time rendered accounts to the plaintiff of the supposed sales, and made large payments to him in respect of the prices of the diamonds. It was discovered, however, subsequently that he had never in fact sold any of the diamonds to either of the above-mentioned firms, and towards the close of the year he quitted this country, leaving a large portion of the value of the diamonds delivered to him as aforesaid unaccounted for to the plaintiff. It appeared that he had pledged some of the diamonds, and some he had

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1907 and with whom he had had previous dealings, for the purpose
OPPEN- of his endeavouring to sell them on his (Schwabacher's) account.
HEIMER The action was brought in respect of five parcels of diamonds
v. delivered under the above-mentioned circumstances by the
FRAZER & plaintiff to Schwabacher on certain dates in September and
WYATT. October, 1906, and never offered by him to Pinto Leite &
Nephews or Edward Kellers, but handed to Broadhurst for sale
as aforesaid. These parcels had been dealt with by Broadhurst on
various occasions in substantially the same manner, which was as
follows. He took the diamonds to the defendants Frazer & Wyatt,
who were diamond merchants, and, after explaining that he
brought them from Schwabacher, who wanted to sell them for cash,
and that he, Broadhurst, could afford to take half of them, but
not the whole, himself, asked Frazer & Wyatt to purchase them
from Schwabacher on joint account with himself. Frazer &
Wyatt agreed to do this, and paid the agreed prices of the
diamonds, which were considerably lower than those at which
Schwabacher was authorised to sell them by the plaintiff, by
their cheques in favour of Schwabacher, taking invoices of
the diamonds from him to themselves. They subsequently
debited Broadhurst in their books with half of the purchase
price of the diamonds, and, when they were ultimately sold by
them at a profit, they credited him with half of that profit.
It will be seen from the judgments that the Court of Appeal
were of opinion, on the evidence as to these transactions, that
the defendants Frazer & Wyatt and the defendant Broadhurst
acted as partners or co-adventurers in the particular speculation
of purchasing the diamonds. The jury found in answer to
questions left to them by the learned judge that Schwabacher, in
obtaining the diamonds from the plaintiff, had been guilty of
larceny by a trick, and that the defendants Frazer & Wyatt
had acted in good faith in the matter, but that the defendant
Broadhurst had not so acted. Channell J., upon further con-
sideration, gave judgment for the defendants Frazer & Wyatt
against the plaintiff, and judgment for the plaintiff for the value
of the diamonds against the defendant Broadhurst. (1)

(1) See [1907] 1 K. B. 519.

The plaintiff applied for judgment or a new trial as against the defendants Frazer & Wyatt; and the defendant Broadhurst applied for judgment or a new trial, on the ground that there was no evidence to support the finding of the jury that he had not acted in good faith, and that the finding was against the weight of evidence. (1)

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Sir R. B. Finlay, K.C., and Rawlinson, K.C. (H. Dobb and E. Dunkels with them), for the plaintiff, in support of his application. In order that the Factors Act, 1889, s. 2, sub-s. 1, may apply, the goods must have been in the possession of the mercantile agent as such with the consent of the owner. The finding of the jury that Schwabacher obtained possession of the diamonds by larceny by a trick is inconsistent with consent by the plaintiff to the possession of them by him. In the previous Factors Acts, which were superseded by the Factors Act, 1889, the expression used was "agent entrusted with the possession of goods." There is no reason to think that the alteration of phraseology in the present Act was intended to alter the law in this respect. Therefore, in order that the Act may apply, there must have been an entrusting or bailment of the goods by their owner to a mercantile agent as such in the course of his business. The finding of the jury in this case negatives the inference that there was any such entrusting or bailment of the goods to Schwabacher as a mercantile agent; for it shews that he never received them as such an agent, but received them under such circumstances that in law he must be regarded as having taken them without the consent of the owner, as a thief. The fallacy underlying the judgment of Channell J. is that he ignores the fact that the consent of two minds is essential to a contract of

(1) The evidence was very lengthy, and the details of the transactions involved were very complicated, but it is thought that the outline of the facts given above will be sufficient for the purposes of the points of law in respect of which the case is reported. Facts bearing upon the question whether the findings of the jury ought to stand or there should

be a new trial, and the course which things took at the trial, so far as material to that question, may be gathered sufficiently from the judgments. The arguments and judgments, so far as they merely relate to that question, are not given at length, inasmuch as the matters involved were rather matters of fact than of law.

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bailment. The finding of the jury shews that Schwabacher did not intend to receive the diamonds as a bailee, but to steal them. The Act cannot apply to a case where in law there was no bailment to the mercantile agent, but a theft by him: see *Cahn v. Pockett's Bristol Channel Steam Packet Co.* (1); *Cole v. North Western Bank* (2); *Hardman v. Booth* (3); Pollock and Wright on Possession in the Common Law, pp. 218, 219.

Secondly, the finding of the jury that the defendant Broadhurst did not act in good faith is fatal to the defence of the defendants Frazer & Wyatt under the Factors Act. It prevents them from saying that the persons taking under the disposition made by Schwabacher acted in good faith. The defendants Frazer & Wyatt and the defendant Broadhurst were joint purchasers and partners for that particular venture. It cannot be argued in a case where partners take under a disposition made by a mercantile agent that the disposition may be good under the Factors Act, 1889, as to one of such partners who has acted in good faith, but give no title to another partner who has not so acted. It is impossible so to split up the transaction. [They cited on this point *Reid v. Hollinshead*. (4)]

J. A. Hamilton, K.C., and *Norman Craig*, for the defendants Frazer & Wyatt. For the purpose of the application of the Factors Act, 1889, s. 2, sub-s. 1, regard must be had, not to the relations between the plaintiff and Schwabacher quoad the title to the diamonds, nor to the question whether Schwabacher was guilty of stealing them as between himself and the plaintiff, but to the position of a person taking in good faith under a disposition made by a mercantile agent of goods which were in fact in his possession with the consent of the owner. It is immaterial as regards the position of the person so taking that the possession of the goods was obtained by the mercantile agent under such circumstances as for the purposes of the criminal law would prevent him from being heard to say that it was obtained by consent of the owner. The Factors Act, 1889, s. 2, sub-s. 1, does not require that the goods should be intrusted to the mercantile agent by the owner, but merely that they

(1) [1899] 1 Q. B. 643.

(3) (1863) 1 H. & C. 803.

(2) (1875) L. R. 10 C. P. 354.

(4) (1825) 4 B. & C. 867.

should be in the agent's possession with his consent. Here the goods undoubtedly were in point of fact in possession of Schwabacher with the consent of the plaintiff. The doctrine of larceny by a trick really involves a legal fiction, for by virtue of it goods which were in truth delivered by their owner to the person accused are held in law to have been "taken" by the latter against the owner's will. That fiction, which really was brought into existence for the purposes of the criminal law, in relation to which it works justice, ought not to be invoked in dealing with questions under the Factors Act in relation to which it would work injustice. The Factors Act, 1889, s. 2, sub-s. 1, is a remedial measure, which was intended to alter the common law in the interest of innocent persons taking under a disposition of goods made by a mercantile agent in possession of them with the consent of the owner, and whether there was such consent in point of fact is the material question for the purposes of that sub-section, not whether a consent given in fact was one which amounted to consent in point of criminal law. For the purposes of the Factors Act, 1889, the question is what was in the mind of the owner of the goods, not what was in the mind of the mercantile agent, when possession of them was obtained from the former by the latter. Transactions of the greatest magnitude are constantly taking place by way of dispositions by mercantile agents, and the effect and object of the successive Factors Acts have been progressively to safeguard the position of innocent purchasers and pledgees in such cases. If the application of the Act is made dependent on the intention which existed in the mind of the mercantile agent when he received the goods, i.e., on his intention then being to steal them or to become a bailee of them, the protection given by the Act will be largely nullified. The observations of Collins L.J. in *Cahn v. Pockett's Bristol Channel Steam Packet Co.* (1), upon which the plaintiff has relied, were mere obiter dicta, and were not necessary for the decision of the case. He only meant by them to reserve the point now raised.

It is clear that the fact that Schwabacher obtained possession of the diamonds by false pretences, or that he was subsequently

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(1) [1899] 1 Q. B. 643, at p. 659.

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guilty of larceny of them as a bailee, would not prevent the defendants Frazer & Wyatt from being protected by the Factors Act, 1889.

[The counsel for the defendants Frazer & Wyatt then proceeded to contend that the evidence in the case would not support a finding that Schwabacher had been guilty of larceny by a trick when he obtained possession of the diamonds, and therefore such a finding could not stand; and also that, having regard to what had taken place at the trial, it was doubtful whether the finding of the jury ought to be interpreted as meaning that he had been guilty of such a larceny; and that, therefore, there ought to be a new trial, if the case had to be determined on that point. The question was raised whether these contentions were open to them, there having been no cross notice of application for a new trial given by them, and as to this Order LVIII., r. 6, was cited. The Court were of opinion that under the circumstances the case ought to be dealt with as if such a notice, if requisite, had been given.]

The essential distinction between the offence of larceny by a trick and that of obtaining goods by false pretences is that in the one case the possession only of the goods is intended by the owner to be parted with, whereas in the other case the intention is to part with the property in them: see *Reg. v. Buckmaster* (1); Archbold's Criminal Pleading and Practice, 23rd ed. pp. 447, 449, and cases there collected. Here the plaintiff intended to do more than merely part with the possession of the diamonds. He parted with their possession to Schwabacher, and also gave him power to transfer the property in them by effecting a sale to the firms indicated by him. Schwabacher, having obtained the diamonds by a false representation, may have been guilty of obtaining goods by false pretences, but he could not be guilty of larceny by a trick. [They also cited on this part of the case *Fuentes v. Montis* (2); *Sheppard v. Union Bank of London* (3); *Kingsford v. Merry* (4); *Baines v. Swainson*. (5)]

With regard to the second point taken for the plaintiff, the

(1) (1887) 20 Q. B. D. 182.

(3) (1862) 7 H. & N. 661.

(2) (1868) L. R. 3 C. P. 268;

(4) (1856) 1 H. & N. 503.

4 C. P. 93.

(5) (1863) 4 B. & S. 270

evidence does not shew that the defendants Frazer & Wyatt were joint purchasers or partners with the defendant Broadhurst in the transaction of the purchase from Schwabacher. They were intended to be, and were, the purchasers from Schwabacher; but, by independent arrangement between them and the defendant Broadhurst, he was to be treated by them as beneficially interested in the profits made by them on resale of the diamonds to the extent of one-half. The way in which the transaction was carried out in their books was merely the business mode of arriving at the amount of the profit due to him. The expression "on joint account" as used in business does not involve that in point of law the parties are joint purchasers or partners in the transaction of the purchase. There were none of the incidents of partnership as between the defendants Frazer & Wyatt and the defendant Broadhurst even quoad the particular transaction. The whole control of the matter rested with Frazer & Wyatt. They did not act as agents for Broadhurst in effecting the purchase, and he found no capital. All that happened was that Frazer & Wyatt, instead of paying anything in the nature of commission to him, gave him a share of the net profit made by them on sale of the diamonds. It was held in *Meyer v. Sharpe* (1) that an agent who is paid by a proportion of the profits of an adventure in goods is not, therefore, a partner in the goods.

Sir R. B. Finlay, K.C., for the plaintiff, in reply. [He was stopped on the question as to the effect of the finding of the jury that Schwabacher, in obtaining possession of the diamonds, had been guilty of larceny by a trick, the learned President stating that the Court were of opinion that, if that finding stood, the judgment in favour of the defendants Frazer & Wyatt could not be supported. He therefore only addressed his observations to other points.]

Colam and Moresby, for the defendant Broadhurst, in support of his application, contended, first, that there was no evidence to support the finding of the jury that the defendant Broadhurst had not acted in good faith, and that the finding was against the weight of the evidence; and, secondly, that, on the facts as proved,

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(1) (1813) 5 Taunt. 74.

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 1907 had, in obtaining possession of the diamonds, been guilty of
 larceny by a trick. On this latter point they cited 2 Russell on
 Crimes, 6th ed., book 3, c. 10, s. 4, p. 141; *Rex v. Harvey* (1);
 OPPEN- *Rex v. Adams* (2); *Rex v. Nicholson* (3); *Rex v. Parkes*. (4)
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Colam, in reply.

Cur. adv. vult.

March 25. SIR GORELL BARNES, PRESIDENT. In this case there are two applications, one of which is made by the plaintiff by way of appeal from the judgment of Channell J. after the trial of the action before him with a jury, asking for judgment against the defendants Frazer & Wyatt or a new trial. There is no cross-notice of application by the defendants Frazer & Wyatt questioning the findings of the jury. It was contended that no such notice was necessary under the rules, but, however that may be, I think that, under the circumstances, the case ought to be treated as though such a notice, if requisite, had been given. The other application is by the defendant Broadhurst, against whom judgment was given after the trial, asking for judgment or a new trial.

The facts, shortly stated, are as follows. The action was brought by the plaintiff to recover from the defendants five parcels of diamonds, or damages for their conversion. By way of defence the defendants relied on the provisions of the Factors Act, 1889, s. 2, sub-s. 1. The plaintiff, who is a diamond merchant, handed the parcels of diamonds which are the subject of the action, as well as others, to one Schwabacher, a diamond broker, who had stated that he had certain prospective customers for them, naming two firms engaged in the diamond trade. It appeared that Schwabacher never offered the diamonds to either of those firms, but handed them to the defendant Broadhurst, for the purpose of his endeavouring to find purchasers for them. He took them to the defendants Frazer & Wyatt, who were

(1) (1787) 1 Leach, 467.

(2) (1812) R. & R. 225.

(3) (1794) 2 Leach, 610.

(4) (1794) 2 Leach, 614.

diamond merchants, and, stating to them that Schwabacher was desirous of selling the diamonds, asked them if they would buy them on joint account with himself. Frazer & Wyatt agreed to do this, and paid the price of the diamonds by their cheques in favour of Schwabacher, he rendering invoices to them. They then debited Broadhurst in their books with half of the purchase-money, and credited him with half of the profits, when the diamonds were sold by them. The foregoing is a sufficient outline of the facts to enable the findings of the jury to be appreciated. Those findings were that Schwabacher obtained the diamonds by larceny by a trick, and that Frazer & Wyatt acted in good faith in the purchase of them, but that Broadhurst did not act in good faith. After an argument on further consideration the learned judge gave judgment for the plaintiff against Broadhurst for the value of the diamonds, and judgment for Frazer & Wyatt against the plaintiff.

To appreciate the points that have been argued before us it is necessary to refer shortly to the evidence as to what took place between the various parties to the transactions in relation to these diamonds. [The learned President then proceeded to read portions of the evidence, the substantial effect of which it has been sought to summarize in the statement of facts at the commencement of this report, and then proceeded as follows :—]

Now it is clear upon that evidence that at common law the defendants would be liable in the action, because they received the plaintiff's diamonds through the unauthorized action of Schwabacher; but by virtue of the Factors Act, 1889, s. 2, sub-s. 1, the defendants might, nevertheless, have a title to the diamonds if they could bring themselves within its provisions. That sub-section enacts that, "Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorized by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has

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C. A. not at the time of the disposition notice that the person making
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It has not been disputed before us that Schwabacher was a mercantile agent, and that, in disposing of the diamonds as he did to the defendants, he was acting in the ordinary course of business of such an agent. It is clear also that Schwabacher was in fact in possession of the diamonds, and that possession of them had been given to him by the plaintiff.

As to that Channell J. said in summing up: "He must be in possession of the goods with the consent of the owner. If that takes place, provided he acts in the ordinary course of business, and the person taking under the disposition acts in good faith, then the owner is bound, notwithstanding that he has not authorized the sale or particular disposition. What one has to see, therefore, first is whether these goods, the diamonds which were in the possession of Simon Schwabacher, were in his possession with the consent of the owner, that is, Mr. Oppenheimer. Now that there was the consent in fact, there is no doubt. They were handed over for a particular purpose, for being sold, or being offered in the first instance for sale, and in all these cases they were supposed to have been sold, to one or other of two firms who have been named. The consent in fact is beyond all possible doubt." I refer to these words because I think they have a bearing on the way in which Channell J. interpreted the finding of the jury in this case. He proceeded to say: "Now the law is perfectly clear that, if there is consent in fact, the operation of this Act is not destroyed by proving that the consent was obtained by fraud. In the present case (and I will go into what the circumstances were directly) I think there is no reasonable doubt that Mr. Oppenheimer consented to this large transaction, which had been going on for some months by the same person dealing with the particular firms. I should think there is no doubt the consent was in fact obtained by fraud, but that does not prevent the Act operating, and that is perfectly clear from the decided cases. But what is not quite clear is whether, if it was not only obtained by fraud, but obtained under circumstances which amount to larceny, that is stealing, if it was obtained under circumstances which amount to stealing then and

there, the Act would not apply." Then the learned judge discussed some cases which illustrate what he had been saying. There is therefore no doubt that Schwabacher was a mercantile agent, that he dealt with the goods in the ordinary course of business of such an agent, and that he was in fact in possession of the goods, which possession had been given to him by the plaintiff.

It is contended, however, for the plaintiff, first, that, having regard to the finding of the jury that Schwabacher obtained possession of the diamonds by larceny by a trick, there was no consent by the plaintiff to the possession of the diamonds by him within the meaning of the Factors Act, 1889, s. 2, sub-s. 1; and, secondly, that, the defendant Broadhurst having been found by the jury not to have acted in good faith, the defendants Frazer & Wyatt, although they were found to have acted in good faith, were, under the circumstances, affected by the fact that Broadhurst, who was jointly interested with them in the purchase of the diamonds, acted in bad faith. The defendant Broadhurst attacks the finding of the jury on this point, contending that there was no evidence to support it, and that it was against the weight of the evidence.

I think that it will be desirable to deal with this latter point first, because in my view, if the conclusion be arrived at that the finding of the jury that Broadhurst did not act in good faith must stand, that will dispose of the case. I say so, because, notwithstanding the argument of the counsel for the defendants Frazer & Wyatt, in my opinion the finding of the jury as against the defendant Broadhurst, if it stands, also affects them.

Channell J., in giving judgment on further consideration, said, in effect, that he did not think that the transaction was that, after Frazer & Wyatt bought the goods, they agreed to give Broadhurst a half-share, but that it was intended from the first that he should have a half-share; and that he thought that the true legal inference was that Frazer & Wyatt bought and acquired the property in the diamonds as to half as beneficiaries, and as to the other half in trust for Broadhurst; and, that being so, they got a good legal and beneficial title as to one half, but that the title as to the other half-share was not good, the result

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being that Frazer & Wyatt could not be said to have converted the plaintiff's diamonds. I confess that I have not been able to follow that conclusion of the learned judge. It seems to me clear upon the evidence that the result of what took place was that the defendants Frazer & Wyatt and the defendant Broadhurst were partners in the particular transactions, and that as such partners they were the "persons taking under the disposition" made by Schwabacher within the meaning of s. 2, sub-s. 1, of the Factors Act, 1889. That being so, it follows, in my opinion, from the finding of the jury as against Broadhurst, that the defendants Frazer & Wyatt cannot bring themselves within that subsection, because they cannot shew that the persons taking under the disposition acted in good faith. As partners in the joint transactions with Broadhurst, I think they must stand or fall with him, and want of good faith on his part must affect them also, although personally they have acted in good faith. The finding of the jury that Broadhurst did not act in good faith appears to me necessarily to defeat the right of the defendants Frazer & Wyatt to assert that they were protected, as having taken the goods in good faith, under s. 2 of the Factors Act, 1889.

It follows that the next point to consider is whether the finding of the jury that Broadhurst did not act in good faith ought to stand. With regard to that question, I think it is clear that the burden of proving that he acted in good faith lies upon the person who seeks to bring himself within the Factors Act, 1889, s. 2. It seems obvious that, as he would have no title at common law, that must be so. If there was any evidence to support the finding of the jury, the question of good faith is eminently one of fact for them to determine. [The learned President then proceeded to discuss the evidence upon the question whether the defendant Broadhurst acted in good faith, and continued as follows:—] In the result I come to the conclusion that there was evidence to support the finding of the jury that the defendant Broadhurst did not act in good faith, and I cannot say, under the circumstances, that their finding was so unreasonable as to be against the weight of the evidence. The application of the defendant Broadhurst must therefore be dismissed, and the finding of the jury must stand.

That being so, it follows from what I have before said that it is really unnecessary to consider the other question as to the effect of the finding of the jury that Schwabacher obtained possession of the diamonds by larceny by a trick, but probably it would under the circumstances be better for me to say how that matter strikes me.

There is no doubt that, in order that the provisions of the Factors Act, 1889, s. 2, sub-s. 1, may apply, the goods must be in the possession of the mercantile agent with the consent of the owner. If the finding of the jury must be read as the plaintiff seeks to read it—and having regard to the direction given by Channell J. to the jury, it is difficult, I think, to read it otherwise—I confess to feeling very great doubt whether, in the face of that finding, Schwabacher can be considered to have been in possession of the goods with the plaintiff's consent. At the close of the case the learned judge left the matter to the jury in this way: "With regard to the other question, the question about larceny by a trick, that is for the plaintiff to satisfy you. If he satisfies you that the possession of these goods was not merely obtained by the fraud of Schwabacher, but that that fraud went to the length of a concocted trick, so that he could be convicted of stealing them there and then—you follow what the difference is—if the plaintiff is right, he could be convicted of stealing them when he was walking away from the place, and before he had taken them to Frazer & Wyatt. That is the difference between stealing them then and there, and stealing at a later stage when he sold them to Frazer & Wyatt. If he had been caught by a policeman when he was going out of the office, then it would have been said that he was stealing them then because of this misrepresentation about Pinto Leite and the other firm. That is what you have to find in order to find that there was larceny by a trick. I leave you that question." Pausing there, I must say that I doubt whether the jury from that direction could have adequately appreciated the difference that there is between the actual delivery of goods and that which amounts to a transfer of the property in them. However, the foreman of the jury, interposing later on, said: "The larceny must be there from the first. I mean to say, supposing he started in

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good faith, and then half-way through, or at the end of September or October, began to decide that he would convert them to his own use, is not that larceny by a trick?" The learned judge replied: "The question is whether these particular parcels of diamonds were stolen by larceny by a trick." Then the wording of the finding is, "We agree that Schwabacher obtained the goods by larceny by a trick." Now the plaintiff says that that finding negatives consent. The defendants on the other hand say that there may have been consent for the purposes of the Factors Act, even though there was larceny. I confess that, if it were necessary to decide the case on this point, I should feel great difficulty upon the terms of the finding, following as it did the statement of the question contained in the concluding words of the learned judge, in interpreting that finding in any other way than as a finding that these parcels of diamonds were stolen by ordinary common law larceny. If the finding must be so interpreted, then I see very great difficulty in saying that there could be consent on the plaintiff's part, because, by the well-known definition of larceny, it consists in feloniously "taking" the goods of another without his consent, and against his will, with intent to convert them to the use of the taker. If the finding is to be read in that way, and it had been necessary to decide the case on this point, I should myself have thought, having regard to the facts of this case, that it was necessary that there should be a new trial on the point. I am inclined to doubt whether Channell J. thought that the finding must be read strictly in the way in which I have read it, and possibly, having regard to the undisputed facts of the case, he may be right in the view which I think he must have taken of the verdict. At the close of the evidence a discussion appears to have taken place as to the questions which were to be left to the jury. The plaintiff's counsel suggested that the question, which ought to be put, was whether Schwabacher obtained the goods in question, or any of them, from the plaintiff under circumstances which amounted to the offence of larceny by a trick, to which suggestion the judge objected that this would be asking them a question of law. The defendants' counsel then said that the proper question was whether Schwabacher was in possession of

the diamonds with the consent of the plaintiff; and then the plaintiff's counsel suggested various specific questions of fact as being questions which should be left to the jury. I am certainly disposed to think that, if it were necessary to dispose of the case on this point, it would have been the safer course to ascertain the facts by putting specific questions of fact to the jury. But, ultimately, the suggestion of putting such questions of fact to the jury on this point appears to have been dropped, and the question was left to the jury in the way that I have already stated. In the course of his summing up the learned judge had said, besides what I have already referred to: "Then do you think this was from beginning to end a trick of the description I put to you, a trick to get hold of the goods for the fraudulent purpose of applying them to his own purposes? If you think that, you will tell us so, and we will deal with it. My view is that, being a bailee, he committed the offence of larceny as a bailee, having got the goods into his possession, and then stolen them, or misappropriated them by pledging or underselling them to the other people contrary to his authority. I am sorry to have to trouble you with that, but I think it is better to do so." After the finding, he said, "Of course there is the point behind whether there is any proper evidence of that. It is so difficult to explain to the jury. I differ altogether from that in point of fact as well as in the law." When the case came before him on further consideration, after reviewing the cases which were cited to him, he said: "It seems to me that the true rule is that, where there is a consent of the owner of the goods to the possession of the goods by the mercantile agent as a mercantile agent—and that is the important part of the matter—that then the statute applies, provided the other conditions are fulfilled; but there may be such a trick as would prevent there being any consent of the owner to the particular man having them as a mercantile agent. The facts in *Kingsford v. Merry* (1) and *Hardman v. Booth* (2), if they applied, might do so; but here there is nothing but a fraud, and a fraud of exactly the same character as took place in *Baines v. Swainson*. (3)

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(1) 1 H. & N. 503.

(2) 1 H. & C. 803.

(3) 4 B. & S. 270.

C. A. 1907 <hr/> OPPEN- HEIMER <i>v.</i> FRAZER & WYATT. <hr/> The President.	There the man represented to one firm that he was acting for another firm who proposed to buy the goods, whereas that firm had given him no authority, and had been in no communication with him, exactly as was the case here." And, after having made these observations, he said later on: "I think, therefore, that this finding of the jury that Schwabacher obtained the diamonds by means of larceny by a trick was an immaterial finding."
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I do not myself see how the finding of the jury could be said to be immaterial, if it meant that the goods were stolen. I think the learned judge's meaning must have been that his view was that, on the undisputed facts, the offence committed by Schwabacher was either obtaining goods by false pretences or larceny by a bailee, because the diamonds were, undoubtedly, originally placed in his hands by the plaintiff, who himself said that he from time to time let Schwabacher have the parcels of diamonds to deal with; and I cannot help thinking that the judge, in saying that the finding of the jury was "immaterial," must have thought that, there being in fact consent as the plaintiff stated, the offence committed was, as I have said, either larceny by a bailee or obtaining goods by false pretences, and that possibly, therefore, he might read the finding of the jury in that sense. If it cannot be read in that way, and if the case had to be decided on this point, I should say that it would be necessary that there should be a new trial.

I do not think that it is necessary, under the circumstances, to enter into a long investigation as to the effect of the various decisions with regard to the exact meaning of larceny by a trick. They appear to be somewhat conflicting. Some of them date from times when larceny was a capital offence, and there was therefore probably a tendency to the conclusion that the facts did not amount to larceny; and others are cases which were decided when that was no longer so, and there was not the same reason for seeking to avoid a conviction for larceny, and in which therefore, in order to prevent a criminal from escaping punishment, he was possibly held guilty of larceny on facts as to which there might be some doubt whether they really amounted to that offence. I do not propose, therefore, to discuss

the cases which have been cited on this subject. As I have said, if it were necessary to decide the case on this point, I think it would be desirable that specific questions of fact should be left to a jury, and that the matter should then be dealt with upon their answers to such questions. I suspect from what took place at the trial that the jury in this case may very probably not have clearly appreciated the distinction between the different kinds of criminal offences which might be charged in connection with such a case, or the effect of the distinction between parting with the possession of goods and parting with the property in them in relation to the question at issue. But it is not necessary to decide the case on this question, the point with which I first dealt being sufficient to determine it. The result is that the judgment in favour of the defendants Frazer & Wyatt cannot stand; the application of the plaintiff for judgment against them must be allowed, and the application of the defendant Broadhurst must be dismissed.

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FLETCHER MOULTON L.J. Upon the facts of this case it is clear that at common law the defendants would have no defence to the action. The defence set up is that they are entitled to the protection given by s. 2, sub-s. 1, of the Factors Act, 1889, which, under certain circumstances, protects a person who in good faith has taken goods under a disposition of them made by a mercantile agent in possession of those goods with the consent of the owner. In my opinion the defence breaks down upon two points—first, because the goods in question were not, according to one of the findings of the jury, in the possession of the mercantile agent with the consent of the owner; and, secondly, because, according to the other findings of the jury, the persons taking under the disposition did not act in good faith. For convenience I will take the second of these points first, inasmuch as the President has done so.

Sect. 2, sub-s. 1, of the Factors Act, 1889, gives protection only where “the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.” In applying that provision to the circumstances of the

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present case, the first question which arises is, Who is the person taking under the disposition here? It appears to me to be incontestable that the persons so taking were the co-adventurers, Frazer & Wyatt and Broadhurst, who purchased these diamonds from Schwabacher on a joint venture, in which Frazer & Wyatt took a half-share and Broadhurst took the other half-share. For the purposes of these particular purchases they were as much partners as Frazer & Wyatt were partners for the purposes of their ordinary business. Where two persons so purchase as joint purchasers, it cannot, in my opinion, be said that the persons taking under the disposition act in good faith within the meaning of the Factors Act, 1889, if either of them acts in bad faith, and notice to either of them, at the time of the disposition, that the person making it has not authority to make the same is notice to both. That proposition appears to me to be so clear that I shall not dwell upon it any further.

The only question, as regards this part of the case, which appears to me to require examination is whether the verdict to the effect that the defendant Broadhurst did not act in good faith was such as the jury were upon the evidence entitled to find. It is not for this Court to say whether they were right or wrong in the conclusion at which they arrived. The question is whether there was evidence for them, and, if so, whether we can say that their finding was perverse or unreasonable. [The learned Lord Justice then proceeded to discuss this question, and arrived at the conclusion that there was evidence to support the finding of the jury in this respect, and that it could not be set aside as being against the weight of the evidence.]

That being so, it follows that the judgment in favour of the defendants Frazer & Wyatt cannot stand for the reasons which I have given, and judgment must be given against them, and the application of the defendant Broadhurst for a new trial must be dismissed.

As the question of law involved is an important one, I feel bound to deal with the other ground upon which I think the defence based upon the Factors Act, 1889, s. 2, sub-s. 1, fails. The question turns upon the words in the earlier part of the section, "where a mercantile agent is, with the consent of the

owner, in possession of goods." Was Schwabacher in possession of these diamonds with the consent of the owner? We have the advantage of having had this important point dealt with in the considered judgment of the Court of Appeal in *Cahn v. Pockett's Bristol Channel Steam Packet Co.* (1) I cannot express my view as to the intention of the Legislature in enacting s. 2 of the Factors Act, 1889, more clearly than by reading a passage from the judgment delivered by Collins L.J., as he then was, in that case. He said (2): "The Factors Act, 1889, which is thus referred to, and as to part of it in terms again enacted, in the Sale of Goods Act, is the last of a series of statutes whereby the Legislature has gradually enlarged the powers of persons in the actual possession of goods or documents of title, but without property therein, to pass the property in the goods to bona fide purchasers. Possession of, not property in, the thing disposed of is the cardinal fact. From the point of view of the bona fide purchaser the ostensible authority based on the fact of possession is the same whether there is property in the thing, or authority to deal with it in the person in possession at the time of the disposition or not. But the Legislature has not carried the rights of a purchaser under these Acts so far as to make the sale equivalent to a sale in market overt. The purchaser must accept the risk of his vendor having found or stolen the goods, or documents, or otherwise got possession of them without the consent of the owner."

That seems to me to be a most judicial appreciation of the Factors Act, 1889, s. 2. The Legislature has given a very wide, but not an absolute, protection to those who purchase from a person in the position of a mercantile agent in the ordinary course of business. I confess I do not feel much affected by the arguments of counsel dwelling upon the necessity of giving a wide interpretation to the provisions of the Factors Act, 1889, because the operations by way of selling or pledging goods effected by persons in the position of a mercantile agent are of such magnitude and importance. I do not think that a Court, in construing an enactment of this kind, has any right to lean in either direction. It is for the Legislature to decide how far the

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(1) [1899] 1 Q. B. 643.

(2) [1899] 1 Q. B. 658.

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protection to be given in such cases shall extend. What its decision in that respect has been must be gathered from the language of the enactment, and we have only loyally to administer that decision. The Legislature has stopped short of giving protection in cases where the goods are in possession of the mercantile agent without the consent of their owner. In *Cahn v. Pockett's Bristol Steam Packet Co.* (1) this Court had to consider the meaning of this provision, and its decision may be summed up, as it appears to me, in a single phrase, namely, that "consent" for the purposes of the section must be what amounts to consent in the eye of the law. Anything that negatives the existence of consent in the eye of the law appears to me to negative its existence for the purposes of s. 2 of the Factors Act, 1889. I do not see how it is possible to come to any other conclusion than that "consent" in the section means what the law recognizes as consent. Collins L.J. proceeds in the passage from which I have quoted to say: "But, if a mercantile agent, or one of the persons whose disposition is made as effectual as that of a mercantile agent, has obtained possession by the consent of the owner, even though it were under a contract voidable as fraudulent—see *Baines v. Swainson* (2); *Sheppard v. Union Bank of London* (3)—he is able to pass a good title to a bona fide purchaser. However fraudulent the person in actual custody may have been in obtaining the possession, provided it did not amount to larceny by a trick, and however grossly he may abuse confidence reposed in him, or violate the mandate under which he got possession, he can by his disposition give a good title to the purchaser. See the distinction between possession obtained by a trick and possession under a contract voidable for fraud noted by Lord Blackburn in *Cole v. North Western Bank*. (4) These considerations seem to me decisive of the crucial question in this case. By sending the bill of lading and the bill of exchange direct to Pintscher, Steinmann & Co. constituted him bailee of both of them. It seems impossible to say that there was any wrongful taking by Pintscher. There was no trick which would have negated a bailment. If he became criminally responsible

(1) [1899] 1 Q. B. 643

(2) 4 B. & S. 270.

(3) 7 H. & N. 661.

(4) L. R. 10 C. P. 354, at p. 373.

for his subsequent dealing with the bill of lading, it must have been as bailee, which presupposes a taking by consent. The circumstances of the obtaining possession would not have supported an indictment for larceny, and the subsequent abuse of his opportunity could not alter the character of the original taking." In interpreting the section the Lord Justice, therefore, held that, when a state of things exists which in the eye of the law negatives consent by the owner of the goods to their possession by the mercantile agent, the protection given by the section, which depends on such consent, does not extend to the case. I loyally accept that decision, which indeed really expresses what my own opinion on the matter would have been independently of it. It has been urged upon us that the opinion so expressed by the learned Lord Justice was merely an obiter dictum, because in that case it was decided that possession was not obtained by larceny by a trick, and therefore the provisions of the Factors Act, 1889 applied. I do not think that what the Lord Justice said can be regarded as merely an obiter dictum. It was necessary for the purposes of the decision to interpret s. 2 of the Factors Act, 1889, and accurately to delimit the scope of the word "consent" as therein used, so that the interpretation thus given was part of the ratio decidendi. It was the interpretation of the section which the Court adopted as the basis of its decision. Having arrived at the conclusion that, if there was a larceny by a trick, there was no such consent as was required by the section, they decided the case in the way they did, because the facts shewed that possession of the goods was not obtained by larceny by a trick. I do not see how the Court could possibly have come to any other conclusion as to the meaning of the words of the section than they did. A mercantile agent is as capable of stealing as any other man, and, if he has stolen the goods, there can be no question, in my opinion, that he must be taken to hold possession of them without the consent of the owner. One of the recognized methods of stealing at common law is distinguished from other types of larceny, and called larceny by a trick, but it is in the eye of the law pure stealing. The indictment in respect of it is in exactly the same terms as the indictment in any other kind of larceny,

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and the person accused thereby of having "taken" the goods must, in order to be convicted, be found guilty of having "taken" them. It follows that the law recognizes a form of larceny in which the apparent delivery of the possession of goods by the owner of them, which has been obtained by a trick *animo furandi*, does not in law import consent to that possession by the owner, so that the person who obtained that possession may be treated as having "taken" the goods without the owner's consent. Neither of my learned brothers appears to have any doubt as to this being the law on the subject.

But, assuming this to be the law, the question arises whether the verdict of the jury to the effect that Schwabacher obtained possession of the diamonds in this case by larceny by a trick can be supported. For the purpose of answering that question we need an accurate definition of larceny by a trick, in order that upon an examination of the evidence we may see whether the elements necessary to constitute that offence exist in the present case. The industry of the counsel for the defendant Broadhurst has resuscitated a number of cases, which illustrate how the infinite variety of the circumstances under which fraud and theft may be committed gives rise to delicate and difficult questions as to whether a particular case falls on one side or the other of the dividing line between the offence of larceny and that of obtaining goods by false pretences; but there is a case which I think enables us to draw the line with regard to what constitutes larceny by a trick with sufficient accuracy for the purposes of the present case. I refer to the case of *Reg. v. Buckmaster*. (1) In that case Manisty J. (2) said, in giving judgment: "On the authorities it is settled law that, if the owner of goods or money parts with the possession, and does not intend to pass the property, and there is at the time an intention to steal in the mind of the person who obtains the possession, that is evidence of larceny." I will not enter into the question whether that definition may not be somewhat too narrow. What has been said in some of the decisions on the subject leads me to doubt whether there may not possibly be cases in which, even though there was an intention

(1) 20 Q. B. D. 182.

(2) *Ibid.* at p. 187

to part with the property, there may be larceny by a trick; but I will take for the purposes of the present case the definition so given, which is in effect that, where the owner of goods is, by a trick employed by a person animo furandi, induced to part with possession of the goods to that person, not intending to pass the property, so that the person getting possession of the goods steals them then and there, that is larceny by a trick. The question then is whether there was in this case evidence upon which the jury might properly find the existence of the essential elements involved in that definition. I think there was such evidence. The issue was placed before the jury most accurately and carefully by the learned judge, and it appears to me that the effect of his summing up was to increase any difficulty which the jury might feel in arriving at the conclusion that there had been larceny by a trick rather than improperly to lessen it. These cases shade into one another by almost imperceptible degrees, and the offences of larceny by a trick, larceny by a person as bailee, and obtaining goods by false pretences are often almost undistinguishable under the circumstances of particular cases; but the crucial point for the purpose of establishing larceny by a trick, as distinguished from larceny by a bailee, seems to me to be that there should have been an intention at the moment of obtaining possession of the goods then and there to steal them. A man may get possession of goods, thinking that he may thereby be enabled at a later period to appropriate them. He may obtain possession of them, contemplating the disposition of them wholly or partly for the benefit of their owner, but desiring to have in his hands the power of misappropriating them, if later on he wishes to do so. In such cases he becomes a bailee of the goods, and, if he misappropriates them subsequently, he is guilty of larceny as a bailee. In such a case, to go back to the language used by Collins L.J. in *Cahn v. Pockett's Bristol Steam Packet Co.* (1), there is no larceny by a trick which would negative a bailment. The person receiving possession of the goods has accepted it as a bailee. In this case were the jury entitled to come to the conclusion that it was the intention of Schwabacher, when he received these diamonds, then and there to steal them?

(1) [1899] 1 Q. B. 643, at p. 659.

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The question is no doubt a somewhat difficult one, but, in dealing with it, I think one must consider the whole of these proceedings of Schwabacher, which extended over several months. I can imagine that, with regard to the earlier stages of Schwabacher's proceedings, a jury might possibly think that, though possession of the diamonds was obtained by him by a false representation, he did not intend then and there to steal them, but obtained possession of them as a bailee. But, as time went on, and he continued selling the diamonds of which he obtained possession from the plaintiff at lower prices than those for which he had to account to the plaintiff, and was thus getting into greater and greater straits, it appears to me that his proceedings tended more and more to assume the complexion of pure stealing; and a jury would be justified in believing that he obtained possession of the diamonds in question in this action with the mere intention of then and there stealing them. It appears from the evidence that he took back to the plaintiff packets of diamonds sealed up, with the name of Pinto Leite & Nephews written upon them, as if he had had an offer from them, and the price which he said that they had offered, and which was accepted by the plaintiff. These diamonds were thereupon given back to him, not to shew to Pinto Leite & Nephews, or anyone else, in order to get an offer for them, but for the purpose of delivering them to Pinto Leite & Nephews in performance of the bargain. Under such circumstances there is strong ground for inferring that his proceedings with regard to those diamonds amounted to mere stealing by a trick. In my opinion the jury were entitled, upon consideration of the whole of the evidence, to infer that, with regard to the diamonds in question in this action, there was really no bailment of them to Schwabacher, or any intention by him to receive them as a mercantile agent, but that they were as much stolen from the plaintiff as if, behind the plaintiff's back, Schwabacher had abstracted them from his desk and put them in his pocket. I cannot say, considering the whole of the circumstances, that the jury would be wrong in coming to the conclusion that, when in the months of September and October Schwabacher obtained possession of diamonds from the

plaintiff, being on the verge of flight from the country, he was simply stealing them, and that is the sense in which I read their finding. The learned judge carefully told them that, in order to come to that conclusion, they must be satisfied that there was an intention on the part of Schwabacher, at the time when he obtained possession of the diamonds, then and there to steal them, so that a constable would be entitled then and there to arrest him for larceny. I think that direction excludes the possibility of the jury having given the verdict which they did give when in fact they thought that Schwabacher was guilty of larceny as a bailee subsequently to obtaining possession of the goods. I cannot, speaking for myself, say that I think the finding of the jury in this respect was an unreasonable one, and, as I have said, assuming it to be correct, it negatives the existence of consent by the plaintiff to Schwabacher's possession of the goods.

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KENNEDY L.J. I have come to the same conclusion as to the result of these applications.

Taking first the question with regard to the liability of the defendants Frazer & Wyatt, it seems to me sufficient to say that, in my opinion, they cannot bring themselves within the protection given by the Factors Act, 1889, s. 2, sub-s. 1, by reason of the transactions by which they came into possession of the diamonds being joint transactions by them and the defendant Broadhurst, whom the jury have found not to have acted in good faith. They were, in the ordinary sense of the word, partners in those transactions with him. On the question how far they were partners with him in the legal sense of the term I will say a word or two in a moment. As co-adventurers they and Broadhurst obtained possession of the diamonds under the disposition made by Schwabacher; and, if the finding that the defendant Broadhurst did not act in good faith is to stand, then I think there must be judgment, not only against him, but also against the defendants Frazer & Wyatt. I have not overlooked the argument put forward by their counsel on this point. They admit that the transaction here was not a purchase by Frazer & Wyatt only, and then a subsequent agreement by them to give Broadhurst a half-share of the profits, but a

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 1907 as a matter of business, what is called a transaction "on joint
 OPPEN- account" may take place without its involving in point of law
 HEIMER the existence of any relation of partnership between the parties.
 v. I agree that there may be such transactions which do not
 FRAZER & involve partnerships in law. As an illustration of this I may
 WYATT. refer to the case of *London Financial Association v. Kelk* (1), where
 Kennedy L.J. it was held that the entering by three parties into an agreement
 to purchase an estate "on joint account" did not, under the
 circumstances of that case, constitute a partnership between
 them. As regards the effect of a joint transaction each case
 must, I think, stand on its own facts. It may often be difficult
 in particular cases exactly to define the constituents of a partner-
 ship in the legal sense, as now laid down by statute and the
 decisions, so as to differentiate them from those of a joint trans-
 action which does not amount to a partnership. It is not
 necessary, I think, for the purposes of our decision in the
 present case to decide that the defendants Frazer & Wyatt and
 the defendant Broadhurst were partners in these transactions in
 the full legal sense of the term. The relation which existed
 between them, and by virtue of which they obtained possession
 of the diamonds, was such that, in my opinion, if Broadhurst
 acted in bad faith in the matter, and therefore, not being able
 to bring himself within the protection given by the Factors Act,
 is liable to the plaintiff, they must be under the same liability.

With regard to the finding of the jury that Broadhurst did not
 act in good faith, I do not desire to say more than that the
 arguments of his counsel have not satisfied me of either of the
 two things which would be necessary to justify us in setting aside
 the finding, namely, that there was no evidence to support it, or
 that the evidence was not such that the jury could reasonably find
 the verdict which they did, or, in other words, that the verdict was
 against the weight of the evidence. I think that there was evidence
 for the jury. I am not prepared to say that, if they had found the
 other way, we could have interfered with their verdict; but there
 were important considerations on both sides, the comparative
 weight of which it was for them to estimate, and, the jury having

done so, I cannot say that, there being evidence to support the finding at which they arrived, that evidence was so slight or insignificant in amount that we should be justified in ordering a new trial.

With regard to the remaining question, namely, as to the effect of the finding of the jury that Schwabacher, in obtaining possession of the diamonds, was guilty of larceny by a trick, I desire to say only a few words. If I do not venture to express quite so definite an opinion on some of the points involved as my brother Fletcher Moulton, it is because, in dealing with a case in which it is not necessary actually to decide those points, and particularly as we are sitting in a civil Court, and the case concerns matters which involve questions of criminal law, I am anxious not to say more than may be requisite for the purpose of explaining my views with regard to the case before us. For the purposes of s. 2, sub-s. 1, of the Factors Act, 1889, the goods must be in possession of the mercantile agent with consent of the owner. In my view "consent" there means that which the law regards as consent, and, if a person is found to have stolen goods from another, and so obtained possession of them, I do not think he can be considered to have been in possession of them with the consent of the owner within the meaning of the section. The expression "larceny by a trick" is not really a legal expression indicating a distinct kind of larceny. It is merely a convenient, or perhaps it may be said, having regard to the questions which have been raised in this case, an inconvenient, mode of describing certain cases of larceny in which the goods have neither been taken by force nor clandestinely without the knowledge of the owner. The cases so described are none the less cases of stealing. The matter is put as well as it can be in Pollock and Wright on Possession in the Common Law, pp. 218, 219, where, under the head of "Consent neutralized by animus furandi," the late Sir Robert Wright deals with the case where a person receives a thing from the owner at his request, intending to appropriate it, and knowing that the owner does not intend him to appropriate it. In this case I think, with the utmost respect for the opinion of Channell J., that, if the finding that the diamonds were obtained by theft from the plaintiff was justified, there is an end of any defence

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under the Factors Act, 1889. I should be very slow to differ from the learned judge on a point of law. I think what he must have had in his mind was that the finding of the jury was wrong, because, upon the facts proved, a finding that Schwabacher had committed larceny of the diamonds by a trick, so that he could have been convicted of larceny immediately on obtaining possession of them, could not be supported. In summing up, the learned judge appears to have clearly indicated to the jury his opinion that the case was one of obtaining goods by false pretences, or larceny by a bailee; and, when he said afterwards on further consideration that he did not agree, either in fact or in law, with the finding, I think what was in his mind was that the facts of the case clearly shewed that the diamonds had from time to time been handed to Schwabacher by the plaintiff with the intention on his part of passing the possession of them to Schwabacher as a mercantile agent under such circumstances as to exclude the possibility of his being found guilty of larceny by a trick in obtaining possession of them, and that it was in that sense that he said that the finding of the jury was immaterial. If it were necessary for the purposes of this appeal to discuss, with reference to the circumstances of this case, the abstract question as to what constitutes the dividing line between larceny by a trick and obtaining goods by false pretences, which was dealt with by my brother Fletcher Moulton, I must say, with great respect to him, that I do not think the matter very clear on the cases. In cases which have come before one on circuit one has often found great difficulty in distinguishing exactly between the two classes of offence, larceny by a trick and obtaining goods by false pretences, and in determining the extent to which it may be necessary to shew that there was no intention to pass the property, in order to bring a case within the category of larceny by a trick. I desire to guard myself by saying that, if it were necessary to discuss the matter further, I think possibly something might be said for the view that, within the meaning of the expressions used in some of the decisions on the subject, there was here such an intention by the plaintiff, on handing the diamonds in question to Schwabacher, not only to pass the possession of them, but also

to confer the power to pass the property in them, as would prevent the case from coming within the definition of larceny by a trick. I am not sure that, if it were necessary to consider the point, I should differ from Channell J. in thinking that the finding ought to have been that the offence of which Schwabacher was guilty was either obtaining possession of the diamonds by false pretences or dishonestly dealing with them subsequently so as to be guilty of larceny as a bailee; but I should respectfully differ from him if he meant to say that, though in truth there was larceny of the diamonds by a trick on the part of Schwabacher, nevertheless there was consent to his possession of them by the plaintiff for the purposes of s. 2 of the Factors Act, 1889. I agree with the learned judge that, unless the facts shewed an actual larceny in obtaining possession of the diamonds, no mere fraud in obtaining such possession, or any subsequent dealing with them in a felonious way by Schwabacher as a bailee, could prevent the protection of the Factors Act from being applicable to the case. It is not, in the view which we have taken, really necessary to express any opinion on the point; but, as I have said, my opinion is that, if the jury intended to find, and the facts were sufficient to justify them in finding, that Schwabacher was guilty of larceny by a trick in the sense that there was a larceny at common law, there ought to be judgment both as against the defendants Frazer & Wyatt and the defendant Broadhurst. In this particular case I should have grave doubt whether the finding of the jury to that effect could be justified. That, however, would only involve a new trial, and it is not necessary under the circumstances to come to a definite conclusion, because the point with which I first dealt is sufficient to decide the case.

Judgment for the plaintiff against all the defendants, and application of defendant Broadhurst dismissed.

Solicitor for the plaintiff: *Julius A. White.*

Solicitors for the defendants Frazer & Wyatt: *F. Kimber Bull & Duncan.*

Solicitors for the defendant Broadhurst: *Baker, Freeman & Co.*

C. A.

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 OPPEN-
HEIMER
v.

 FRAZER &
WYATT.

 Kennedy L.J.

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