

[IN THE COURT OF APPEAL.]

## WHITEHORN BROTHERS v. DAVISON.

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Nov. 29, 30 ;  
Dec. 1.

*Contract—Fraud—Sale of Goods—Voidable Contract—Pledge by Purchaser—Transferee in Good Faith and without Notice—Onus of Proof—Criminal Law—Larceny by a Trick—Goods on Sale or Return—Power given to pass Property in Goods—Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 23.*

Where the contract for sale of a chattel is voidable by the seller as against the buyer on account of fraud practised by the buyer upon the seller, and, before any election to avoid the sale by the seller, the buyer pledges the chattel to secure an advance, the onus lies on the seller who seeks to avoid the sale, and recover the chattel from the pledgee, of proving that the pledgee took the chattel with notice of the fraud or otherwise than in good faith.

*Semble* that, where the owner of an article is induced, by a false representation made by another with fraudulent intent that he has a customer who desires to purchase such an article, to deliver the article to that other on sale or return for the purpose of his endeavouring to get the supposed customer to buy it from him, the case is one not of larceny by a trick, but of obtaining goods by fraud.

APPLICATION for judgment or a new trial in an action tried by Bray J. with a jury.

The action was for the recovery of a pearl necklace alleged to belong to the plaintiffs, and to be wrongfully detained by the defendant. (1)

The plaintiffs were manufacturing jewellers, and the defendant was a pawnbroker. On July 31, 1909, being the Saturday before the August Bank Holiday in that year, one Bruford, whom the plaintiffs knew as a jeweller and dealer in pearls, asked a member of the plaintiffs' firm, named Bakewell, on the telephone whether the plaintiffs had in stock a two-row pearl necklace at the price of about 1000*l.* Bakewell replied that they had not, but they had a three-row pearl necklace at 1400*l.* Bruford said that he had a demand from a very good client of his in the country, and, as he was sending others to this client, he would like to include the three-row necklace. The plaintiffs

(1) The claim was framed, alternatively, in *detinue* or *trover*, but the plaintiffs' counsel elected to rest the plaintiffs' case on the claim in *detinue*.

C. A. thereupon sent the three-row necklace, which was the subject-  
1910 matter of the action, to Bruford, with what was spoken of as an  
“approbation note” in the following terms:—“London,  
WHITEHORN 31/7/1909. Whitehorn Brothers, 19, 20, and 21 Featherstone  
BROTHERS Buildings, Holborn, W.C. On sale or return: Mr. Bruford, 56,  
v. Maddox Street, W. Necklace. Pearl, 3 row. [Then followed  
DAVISON. further description and price of the necklace.] Net cash.” On  
August 5 Bruford pledged the necklace so sent him with the  
defendant Davison as security for an advance of 875*l.* made to  
him by the defendant, and also as a collateral security for pay-  
ment of all other advances made by the defendant to him and of  
all debts then or thereafter owing to the defendant from him.  
The plaintiffs made inquiries of Bruford through the telephone,  
on several occasions at the end of the week ending August 7  
and during the next week, as to what he had done about the  
necklace, and he answered to the effect that he had not yet  
heard from his client. At the end of the second week he  
telephoned to the plaintiffs that his customer had selected the  
necklace, that he saw that the plaintiffs had marked it “net  
cash,” but his customer, who was a very sound and good man,  
was in the habit of taking six months’ credit on an open account.  
Bakewell thereupon went up to Bruford’s place of business,  
when Bruford repeated what he had said about his customer. It  
was arranged that Bakewell should consider the matter till  
Monday, August 16, and on that date he telephoned to Bruford  
that it was the first transaction between them, and, as it was for  
such a large amount, the plaintiffs wished to make it a cash  
transaction, and, in order to offer him an extra inducement to  
pay cash, they would allow him 4 per cent. off the amount.  
Bruford in answer said that he would consult his customer and  
let them know. Bakewell going away for his holiday, the  
matter was subsequently taken up by one Whitehorn, another  
member of the plaintiffs’ firm, and various conversations took  
place between him and Bruford, who represented that the  
necklace had been sold to a customer, and that he practically  
could not approach him to insinuate any question as to his  
bona fides by asking him for cash. The result, in substance, of  
further negotiations ultimately was that the necklace was

invoiced by the plaintiffs to Bruford as sold to him on August 20, 1909, and the plaintiffs took two bills from him for the price, dated September 1, 1909, one for 750*l.* at five months, and the other for 750*l.* at six months. These bills were afterwards dishonoured, Bruford having absconded. The defendant made a further advance on a pledge of goods to Bruford on September 10, 1909. The plaintiffs subsequently demanded the pearl necklace from the defendant, who refused to give it up. During the examination and cross-examination of Bakewell, who was called as a witness for the plaintiffs at the trial, questions were asked of him, and a discussion took place, as to the trade meaning of the term "net cash" in an approbation note such as was sent with the necklace, the case sought to be made by witnesses for the plaintiffs being that it meant that the property in the article sent on sale or return was not to pass from the plaintiffs until they had received cash. In the course of the discussion the learned judge put to the witness Bakewell the following questions to which the following answers were given. Question: "Upon the terms upon which you parted with this necklace to Bruford would the property pass to Bruford without your receiving the cash?" Answer: "No." Question: "Was it your intention that the property should pass to Bruford without receiving cash?" Answer: "Not without receiving the money." When summing up to the jury, the learned judge, in leaving to them the second of the three questions which he left to them as after mentioned, told them, in substance, that the answers of the witness to the before-mentioned questions were not conclusive at all, because they had to look not merely at the intention of the plaintiffs, but at the intention of both parties, and they must consider whether upon the evidence the trade meaning of the term "net cash" would convey to the person receiving the approbation note the meaning that the property in the necklace was not to pass till the plaintiffs had received cash.

The transaction of pledge by Bruford was entirely carried out with the defendant's manager, the defendant being an invalid at the time. The manager was called as a witness at the trial, and gave evidence as to the details and circumstances of the pledge on August 5, 1909, and various other business transactions,

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C. A. in the way of pledges and sales of jewellery, which he had  
1910 had with Bruford, whom he had known for some time in business. He stated that he had made divers advances to Bruford  
WHITEHORN on pledges of jewellery before August 5, the first of such  
BROTHERS advances being on April 22. The total amount of such advances  
v. remaining unpaid on August 5 appeared to have been something  
DAVISON. like 3000*l*. The reason Bruford gave to him for requiring these  
advances was that he had sustained a heavy loss through a firm  
who were his debtors not meeting their liabilities to him, and the  
witness said that he had never had any reason to suspect Bruford,  
and had no suspicion that there was anything wrong when  
making the advance on the necklace. (1)

When summing up to the jury, the learned judge, in leaving to them the last of the three questions which he left to them as after mentioned, made the following observations: "It is for the defendant to prove that he did advance money on the necklace in good faith and without notice of Bruford's fraud; that he had not any particular notice of this particular fraud I think is pretty clear, but what the plaintiffs say is this; that he did not take this in good faith: they say that he must have known, and you have a right to infer that he must have known: they suggest that he must have known of it by the large sums that he had out: he must have known there was a doubt whether Bruford had really these goods or not; whether he was really the owner of the goods and had the right to pledge them or not, and, that being so, he abstained and intentionally abstained from making any inquiries at all."

The learned judge left the following questions to the jury, which they answered in the following manner:—1. Did Bruford obtain possession of the necklace by fraud with the intention at the time of stealing it? Answer: Yes. 2. Was it one of the terms of the sale or return transaction of July 31 between the plaintiffs and Bruford that the property in the necklace should

(1) The details of the evidence of this witness, which was lengthy, are not material to the points of law in respect of which the case is reported, but they, of course, formed the

subject of discussion in reference to the question whether judgment should be entered for the defendant or a new trial should be ordered.

not pass until the plaintiffs were paid cash? Answer: Yes.  
3. Did the defendant advance money on the necklace in good faith, and without any notice of Bruford's fraud, (a) on August 5? No: (b) on September 10? No. Upon these findings the learned judge gave judgment for the plaintiffs.

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The defendant applied for judgment or a new trial on the grounds (1.) that there was no evidence to support the finding that Bruford obtained the necklace by larceny, or with the intention of stealing it, or, alternatively, that the answer of the jury to the first question put to them was against the weight of the evidence; (2.) that on the facts proved or admitted Bruford obtained the said necklace by false pretences; (3.) that the learned judge misdirected the jury in explaining to them what constituted larceny, and in not sufficiently directing them as to the distinction between larceny and obtaining by false pretences; (4.) that, upon the true construction of the plaintiffs' approbation note, the property in the necklace passed to Bruford upon his doing any act adopting the transaction or exercising an act of ownership over the necklace, and that the learned judge was wrong in admitting evidence as to the meaning of the words "net cash" and in leaving it to the jury to say what the words "net cash" meant, and that he misdirected the jury as to the effect of the said approbation note; (5.) also that the learned judge misdirected the jury (a) in not telling them that the invoicing and sale of the necklace by the plaintiffs to Bruford, and the taking by them of his acceptances for the price after the pledge to the defendant, completed the defendant's title, and vested the property in the necklace in the defendant; (b) in telling them that it was for the defendant to prove, and that the onus was upon him to prove, that, in advancing money to Bruford on August 5, 1909, and September 10, 1909, he acted in good faith and without notice of Bruford's fraud, and that the large sums which the defendant did so advance afforded evidence on which the jury could properly find that he was guilty of fraud, and intentionally abstained from asking questions; (c) in not properly directing the jury as to what constituted fraud or bad faith, or absence of good faith, and as to the mode in which and the evidence on which the jury could

C. A. find that the defendant acted in bad faith; (6.) that the findings  
 1910 of the jury in answer to the second and third questions left  
 WHITEHORN to them by the learned judge were against the weight of the  
 BROTHERS evidence.

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*J. R. Atkin, K.C.*, and *C. L. Attenborough*, for the defendant.  
 The transaction by which Bruford obtained possession of the necklace could not amount to larceny by a trick. Larceny by a trick is where the owner of a chattel is induced to part with the possession of it by a trick, but does not intend that the property in it should pass. Where the owner parts with possession of the chattel to another person upon such terms that he gives to that person a power to vest the property in himself or a third person, as in the case of an ordinary "sale or return" transaction, or where the bailee of the chattel is intended, as in the present case, to have power to sell it on his own account to a customer so as to pass the property to him, the transaction cannot be larceny by a trick, but may amount to obtaining goods by false pretences. [They cited on this point *Kirkham v. Attenborough* (1); *Weiner v. Gill*. (2)] There was really no evidence to support the finding of the jury on the second question left to them, and, if there was, their finding is against the weight of the evidence. But, in reality, the question whether there was larceny by a trick, and the question as to the effect of the term "net cash," both became immaterial in this case, because the property in the necklace passed to Bruford by the subsequent transaction by which bills were taken for the price. The effect of that transaction clearly was that the necklace was sold to him on credit, and the property in it passed to him. His title would then feed the title of the defendant. It may be admitted that the sale to Bruford might be voidable on the ground of fraud as against him, but it was not void; and if, before its avoidance, he had passed the property in the necklace to a transferee for value who took it in good faith, and without notice of the fraud, it could not be avoided as against such a transferee: see *Parker v. Patrick* (3); *Stevenson v. Newnham* (4); *White v. Garden*. (5) The whole

(1) [1897] 1 Q. B. 201.

(3) (1793) 5 T. R. 175.

(2) [1906] 2 K. B. 574.

(4) (1853) 13 C. B. 285.

(5) (1851) 10 C. B. 919.

question therefore comes to be whether the title of the defendant can be avoided on the ground that he took the title to the necklace which prima facie passed to him otherwise than in good faith, or with notice of the fraud. There was really no evidence sufficient to support the finding of the jury upon this question, or at any rate it was against the weight of the evidence; but in any case their finding cannot stand, because the learned judge misdirected them by telling them that the onus of proving that he took the necklace in good faith and without notice rested on the defendant. It is submitted that this was a misdirection. The general rule of law, by which a person is to be presumed innocent of crime or fraud until he is proved to be otherwise, applies, and it cannot be that in such a case the onus lies upon the defendant of proving that he is innocent. The onus of proof must lie on the plaintiffs, who are seeking to avoid the prima facie good title by which the property in the necklace, that was until avoidance of the transaction vested in Bruford, passed to the defendant. In the case of bills of exchange, by s. 30, sub-s. 2, of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), where the acceptance, issue, or subsequent negotiation of the bill has been obtained by fraud, the onus is, no doubt, thrown on the holder of shewing that, subsequently to the alleged fraud, value has in good faith been given for the bill: see *Tatam v. Haslar*. (1) But prior to that Act it seems to have been a moot point whether, on the question whether the holder had taken the bill in good faith or otherwise, the onus lay on him or the other party; and Lord Blackburn left that question open in the case of *Jones v. Gordon*. (2) But the case of a negotiable instrument is altogether different from that of a chattel. In the case of the latter ex hypothesi the property has passed, subject to the possibility of its being divested by avoidance of the transaction; in the case of a negotiable instrument the question is as to the title to a chose in action, and the question is, not whether a voidable title can be avoided, but whether by the law merchant a person has given to another a title to sue where he had none

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(1) (1889) 23 Q. B. D. 345.

(2) (1877) 2 App. Cas. 616, at p. 628.

C. A. himself. [They also cited *Bryce v. Ehrmann* (1) ; *Truman v. Attenborough* (2) ; *Load v. Green*. (3)]

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DAVISON. *Rawlinson, K.C.*, and *Reginald J. White* (*H. Dobb* with them),  
for the plaintiffs. If the question as to whether the defendant took the necklace in good faith was rightly answered by the jury, then all the other questions become immaterial. It is impossible for the defendant to deny that the necklace was obtained by a fraud on the part of Bruford, and therefore he had at best a voidable title. Assuming that the property in the necklace passed by the subsequent transaction by which bills were taken for the price, that transaction was procured by a continuance of the original fraud and misrepresentation by which possession of the necklace had been in the first instance obtained from the plaintiffs. The defendant's title was therefore voidable, unless he took the necklace in good faith and without notice. That being so, the question is, on whom does the onus lie in such a case? It is submitted that it lies on the defendant. That this is so is recognized by the Sale of Goods Act, 1893, s. 23, which provides that "when the seller of goods has a voidable title thereto, but his 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." That Act was a codification Act intended to codify the common law as to the sale of goods. The language of that section clearly indicates that the onus of proof is on the buyer in such a case, it being for him to bring himself within the proviso. The same principle must apply to a pledge. A similar question may arise under the Factors Acts, and in *Oppenheimer v. Frazer & Wyatt* (4) such a question under those Acts came before the Court of Appeal. It appears to have been there held that the onus of proof lies on the purchaser of the goods fraudulently sold.

[KENNEDY L.J. A factor is a mere agent, and has no title to the goods.

BUCKLEY L.J. In the present case Bruford had a title to the

(1) (1904) 7 F. 5.

(2) (1910) 26 Times L. R. 601.

(3) (1846) 15 M. & W. 216, at p. 219.

(4) [1907] 2 K. B. 50.



goods, though it was a title which might in certain events be avoided.]

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In the case of a bill of exchange, where the acceptance was obtained by fraud, the onus lies on an indorsee of shewing that he gave value in good faith and without notice. It is submitted that this is an a fortiori case as compared with that of a bill of exchange. The property in the instrument passes in the case of a bill of exchange with the right of action, and by the law the instrument is negotiable. If the holder of such an instrument has, where it was originally obtained by fraud, to prove that he took it bona fide for value, a fortiori the onus ought to lie upon the holder of a chattel, which was obtained by fraud from its owner, of proving that he acquired it in good faith. There was evidence here upon which the jury were entitled to find that the defendant did not take the necklace in good faith and without notice of the fraud. Prima facie a man cannot give a better title than he has himself, and a transferee takes subject to infirmities in the title of his transferor : *Kingsford v. Merry* (1) ; *Cundy v. Lindsay*. (2)

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[BUCKLEY L.J. The last-mentioned case has no application here. There no title passed to the fraudulent vendor, because there never was any contract with him by the original owner of the goods. Here Bruford had a title, though a voidable one.]

It is submitted that the finding that Bruford obtained possession of the necklace by fraud with the intention of stealing it was justified by the evidence, and that the whole transaction, of which the subsequent agreement with regard to giving bills for the necklace was part and parcel, amounted to larceny by a trick and was therefore void : see per Fletcher Moulton L.J. in *Oppenheimer v. Frazer & Wyatt* (3) ; and consequently the property in the necklace never passed to Bruford. What took place after August 5 is immaterial. The larceny was then complete, for it was Bruford's intention to get possession of the necklace and dispose of it dishonestly then and there, as he did, and what took place afterwards was a continuance of the same transaction : *Percy Edwards, Ltd. v. Vaughan*. (4) The evidence

(1) (1856) 1 H. &amp; N. 503.

(3) [1907] 2 K. B. 50, at p. 72.

(2) (1878) 3 App. Cas. 459.

(4) (1910) 26 Times L. R. 349, 545.

C. A. shewed that the effect of the approbation note was that the  
 1910 property in the necklace was not to pass till the plaintiffs had  
 WHITEHORN received the price in cash. The note had the same effect as that  
 BROTHERS in *Weiner v. Gill*. (1)  
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DAVISON. [VAUGHAN WILLIAMS L.J. There was an express stipulation  
 in that case to that effect, but on the ordinary meaning of the  
 terms of the note in this case there is no such stipulation.]

The evidence shewed that the term "net cash" did not merely  
 indicate the time of payment, but meant that the option to take  
 to the goods was only to be exercisable on performance of the  
 condition that net cash was to be paid. The verdict was not  
 against the weight of the evidence on the question of bona fides  
 on the part of the defendant. In any case the evidence raised  
 a question for the jury, and therefore judgment cannot be  
 entered for the defendant. [They also referred to s. 18, r. 4 (a),  
 of the Sale of Goods Act, 1893.]

*C. L. Attenborough*, for the defendant, in reply. Sect. 23 of  
 the Sale of Goods Act, 1893, refers to a sale of goods, not to  
 a pledge of them; but, assuming that it does apply, it was never  
 intended to introduce any alteration into the common law on  
 this subject, and the mere fact that the last sentence of the  
 section is put in the form of a proviso ought not to be taken  
 as an indication that it was intended to throw the onus on the  
 purchaser of proving that he bought in good faith. There was  
 really no evidence of bad faith on the part of the defendant,  
 and, if the onus did lie on him, he amply satisfied it. [He cited  
*Oppenheimer v. Attenborough* (2); *Bailey v. Bidwell* (3); *Oakley*  
*v. Boulton* (4); *Goodman v. Harvey* (5); *Moss v. Sweet* (6);  
*Payne v. Wilson*. (7)]

VAUGHAN WILLIAMS L.J. In this case the action was originally  
 framed in detinue or trover, alternatively, but the plaintiffs'  
 counsel elected to rest their case upon the claim in detinue.  
 The subject-matter of the action is a pearl necklace, which was

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| (1) [1906] 2 K. B. 574.          | (5) (1836) 4 Ad. & E. 870.      |
| (2) [1907] 1 K. B. 510; [1908] 1 | (6) (1851) 16 Q. B. 493.        |
| K. B. 221.                       | (7) [1895] 1 Q. B. 653; 2 Q. B. |
| (3) (1844) 13 M. & W. 73.        | 537.                            |
| (4) (1888) 5 Times L. R. 60.     |                                 |

obtained from the plaintiffs by a man named Bruford, who, according to the common admission of both parties, was, up to the time of the happening of the events out of which this action arises, a man of good reputation. Unfortunately this man, who, up to that time, seems, for aught that appears, to have been an honest commercial man, for some reason became short of funds in his business, the reason which he assigned when he pledged the necklace in question being that he was the principal creditor of some people in the jewellery trade who had not paid what they owed him; and, that being so, he obtained this necklace in the manner appearing from the evidence. It is contended for the plaintiffs that the necklace was obtained by Bruford from them under circumstances which constituted larceny by a trick. Having regard to the subsequent transaction by which the plaintiffs in fact sold the necklace in question out and out to Bruford, and took two bills, one at five months and the other at six months, for the price of it, I do not think that the question whether there was originally larceny by a trick continues to be of material importance in this case; but I may say, in passing, that, if I had to deal with that question for the purpose of deciding this case, I should have great difficulty in arriving at the conclusion that what Bruford did amounted to larceny by a trick. There was, no doubt, evidence to shew that he did by fraudulent statements persuade the plaintiffs to enter into a contract with him, which, taking the view of it most favourable to them, appears to me to have been a contract under which possession of the necklace was given to him together with an option, within a reasonable time, I suppose, to accept as sold to him the necklace so delivered on sale or return for a price to be paid in cash, or to return the same. That being so, the case is one in which he, undoubtedly, got possession of the necklace by fraud, but it appears to me that he got it under a contract between himself and the plaintiffs. He not only got it under this contract, but, admittedly, the object of that contract was that he should have an opportunity of seeing whether he could sell the necklace to a customer before he made up his mind whether he would accept it on the terms of the approbation note. Under these circumstances

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I should find it very difficult to arrive at the conclusion that he was guilty of larceny by a trick. I do not, as at present advised, think that it would be stealing, though his conduct would no doubt be fraudulent and dishonest, if he got possession of the necklace from its owners, who were willing to sell it upon the terms which I have mentioned. I think that would constitute obtaining goods by fraud, and not larceny. In such circumstances, it would be under a contract that the possession of the article was obtained, the object of giving that possession being that it should be offered by the fraudulent person for sale by him to any customer of his whom he thought to be likely to purchase it; and I do not think that it would make any difference in this respect that he said that he had such a customer at the moment. I should, as I have already said, feel the greatest difficulty in coming to the conclusion that, when goods were delivered to a person for the purpose of being dealt with as I have described, this could constitute larceny by a trick. Having regard to the conclusion at which I have arrived as to the effect of the subsequent transaction between the plaintiffs and Bruford, I do not think I should be justified in going at greater length into this question. All I will say is that I cannot find in the long series of cases on the subject, beginning with *Parker v. Patrick* (1) and coming down to *Cundy v. Lindsay* (2), any authority that leads me to the conclusion that, where possession of goods is given under such a contract as in fact existed in the present case, it can be treated as obtained by larceny. It may be treated as obtained by false pretences, but that is a very different thing, because in that case, if the goods are transferred to a third person, he takes under a contract which, though voidable, is not void, and is valid till avoided.

In this case, the necklace having been obtained by Bruford from the plaintiffs on July 31, it was pledged by him with the defendant on August 5. Subsequently the plaintiffs communicated with Bruford on several occasions on the subject of payment for the necklace, with the result, as it appears to me, that, ultimately, they made a contract with him for the sale of the necklace to him out and out on the terms that the two bills were

(1) 5 T. R. 175.

(2) 3 App. Cas 459.

to be taken for the price. It is by reason of this event that I have come to the conclusion that the question of larceny by a trick becomes of no importance in this case. The title of Bruford to the necklace was, at any rate for the time being, perfected by that transaction, and would go to feed the title of the defendant, his pledgee, the result being that, if the defendant's title is not vitiated by bad faith on his part or notice, he has a good title to the necklace.

Having said this much, I now propose to deal with the grounds of the present application, and so much of the learned judge's summing up as is necessary to make the notice and grounds of the application intelligible. The first ground of application is "that there was no evidence to support the finding that Bruford obtained the necklace by larceny, or with the intention of stealing it, or, alternatively, that the answer of the jury to the first question put to them was against the weight of the evidence." The answer of the jury to that question was in the affirmative. As I have before pointed out, the finding of the jury upon that question is not, having regard to the subsequent sale to Bruford, essential to the decision of the case. I very much doubt whether the jury's finding was justified in point of law, and whether they apprehended what is necessary to constitute larceny by a trick. This case, as I have already said, is not one of merely obtaining possession by a trick, but one in which the plaintiffs gave possession of the necklace under such circumstances that they must have intended that it should be exhibited to a customer of Bruford, and that he should have the power, if he chose, of accepting the article which was delivered to him on sale or return, and of transferring the property therein to a purchaser. The second ground of application is "that, on the facts proved or admitted, Bruford obtained the said necklace by false pretences." That it was so obtained on July 31 I entirely agree, and therefore I take no exception to that statement. The third ground is "that the learned judge misdirected the jury in explaining to them what constituted larceny, and in not sufficiently directing them as to the distinction between larceny and obtaining by false pretences." As I have already intimated, I think that there is a good deal which might be said in support of that ground. The fourth

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C. A. 1910 ground is "that, upon the true construction of the plaintiffs' approbation note, the property in the necklace passed to Bruford upon his doing any act adopting the transaction, or exercising an act of ownership over the necklace, and that the learned judge was wrong in admitting evidence as to the meaning of the words 'net cash,' and in leaving it to the jury to say what the words 'net cash' meant, and that he misdirected the jury as to the effect of the said approbation note." These last two grounds really become immaterial upon the view which I take as to the title to the necklace which Bruford got subsequently, and its operation in favour of the defendant. I need not read all the grounds of appeal. I do not think that I need say much about the summing up of the learned judge as regards the effect of the subsequent transaction as giving a title to Bruford, which would enure to the benefit of the defendant, because he really seems to have said nothing on that subject. The next ground I will read is 5 (b), namely, that the learned judge misdirected the jury "in telling them that it was for the defendant to prove, and that the onus was upon him to prove, that, in advancing money to Bruford on August 5, 1909, and September 10, 1909, he acted in good faith and without notice of Bruford's fraud." Now, pausing there, it is, I think, clear, with regard to this ground of appeal, that, when you have a contract of sale which is voidable on the ground of fraud, or for any other reason, and, before it is avoided by the seller, the buyer, as against whom it could have been avoided, has transferred the subject-matter of the contract to an innocent third person who has given value and has accepted the transfer without either knowledge of anything wrong, or any knowledge of such circumstances as might lead him to wish not to make any further inquiry lest he should find that there was something wrong, the contract cannot be avoided as against that person; and I am of opinion that the onus of proving that there are such circumstances as prevent the third person so purchasing from being such an innocent purchaser rests on the plaintiff who seeks to recover the subject-matter of the contract from him, and not on the defendant. I do not think that I need go through the cases cited during the argument at length. But, taking the cases from that of *Parker*

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v. *Patrick* (1), before Lord Kenyon, down to *Jones v. Gordon* (2), in the House of Lords, I find no trace of any such doctrine as that the onus in such a case lies on the third person so purchasing. The very statement which occurs again and again that in such cases the contract is a voidable and not a void contract, i.e., that it is valid till avoided, seems to me to indicate that the onus of proof for the purpose of avoiding it as against the third person must lie on the person who is seeking to impeach that which up to that time is a valid contract. Common sense appears to me to point to the same conclusion. With all respect to Bray J., I think that his ruling on this point was wrong; but I must say that, after reading the shorthand notes of the trial, I cannot help thinking that this question of the onus of proof was not much, if at all, debated before the learned judge; but I do not think that this is a case in which one can say that, because there was no discussion of the subject, and no objection was taken that the ruling of the learned judge was not accurate, when he was summing up, the defendant is debarred from relying on this ground, for in the speech of the defendant's counsel he appears specifically to have made the point that the onus was on the plaintiffs. Under these circumstances I do not propose to say any more on this ground of appeal beyond pointing out that this is a misdirection which in itself would not only justify us in sending this case down for a new trial, but would make it our duty at any rate to do that. I will now go back to the end of paragraph (b) of the fifth ground of application, which alleges that the learned judge misdirected the jury in telling them "that the large sums which the defendant did so advance afforded evidence on which the jury could properly find that he was guilty of fraud and intentionally abstained from asking questions." I have already stated the grounds upon which I think that there must, at any rate, be a new trial, but the question appears to me to arise, in relation to this ground of application, whether the judgment should not be entered for the defendant, and whether there was really any evidence to go to the jury to support their finding on the third question which the judge put to them, namely, "Did

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(1) 5 T. R. 175.

(2) 2 App. Cas. 616.

C. A.      the defendant advance money on the necklace in good faith and  
1910      without any notice of Bruford's fraud (a) on August 5 or (b) on  
WHITEHORN      September 10?" and to which the jury returned an answer in the  
BROTHERS      negative. It must be remembered that, when they were asked  
v.      that question, it was upon the basis that the onus of proof of  
DAVISON.      good faith and absence of notice was on the defendant. I think  
Vaughan      that was wrong, and I propose to deal with the matter on the  
Williams L.J.      basis that the onus was on the plaintiffs. In order to prove  
absence of good faith, you must either prove notice, or the fact  
that there was dishonesty, or shew that there is evidence that  
the defendant himself suspected the security which was being  
offered to him. I really think that, if the jury had been asked  
whether there was any evidence that the defendant suspected the  
goodness of the security that he was accepting, they would not have  
arrived at the answer which they gave. I will not lengthen my  
judgment by referring in detail to the passage in the judgment of  
Lord Blackburn in *Jones v. Gordon* (1), in which he points out the  
sort of evidence you must have before you can come to the conclu-  
sion in such a case that there is notice or an absence of good faith,  
but, putting it shortly, it comes to this, that you will be justified  
in finding that there was notice, or an absence of good faith, if  
you find anything to shew that the person taking the security  
made no inquiries about it, or where it came from, because he  
feared the answer which he might get, and feared that he might  
get an answer which shewed that something was wrong. [The  
Lord Justice here discussed the evidence.] I think that there is  
in this case no evidence to support the finding of the jury on  
this question, and that under the circumstances judgment ought  
to be entered for the defendant.

BUCKLEY L.J. Bruford was a pearl merchant. He had for many years before July, 1909, been, and in that month was, in good commercial credit and reputation, but he was, or at any rate in July, 1909, had become, dishonest. These facts are common ground as between the parties in this case. The defendant derives title to the article in question under Bruford. The question is whether the defendant has got a good title.

(1) 2 App. Cas. 616.



The first question upon which I am going to say something, although I do not think that it is really necessary to decide it in this case, is whether there was in July, 1909, larceny by a trick by Bruford. In my opinion there was not. I think there is larceny by a trick where the owner of goods, being induced thereto by a trick, voluntarily parts with the possession of the goods, but does not intend to pass the property in them, and the recipient has the animus furandi; and the same is true where the owner of the goods does not intend to pass the property in them to the particular person with whom he is dealing, and has been deceived by that person as regards the identity of the person with whom he is dealing. That was the case in *Cundy v. Lindsay*.<sup>(1)</sup> On the other hand, goods are obtained by false pretences where the owner of the goods, being induced thereto by a trick, voluntarily parts with the possession of the goods, and does intend to pass the property. The question which is material under the circumstances of the present case is this. Suppose the facts are that the owner of the goods, being induced thereto by a trick, intends, not to pass the property in them, but to confer on the person to whom he gives possession a power to pass the property; under which head does that case fall? Prima facie it would look, inasmuch as he does not intend presently to pass the property, as if that would be larceny by a trick. I think, however, that is not so. It seems to me that, where the owner of the goods intends to confer a power to pass the property, it is a case of obtaining goods by false pretences. It is, I think, obtaining goods by false pretences where the owner, being induced thereto by a trick, voluntarily parts with the possession, and either intends to pass the property, or intends to confer a power to pass the property. If he gives, and intends to give, that power, and the power is exercised, the person who takes under the execution of the power obtains the property, not against, but by the authority of, the original owner, and none the less because the authority was obtained by fraud. One may put the same thing in a different way. A man may steal a chattel, but he cannot steal the power to dispose of a chattel. A man may obtain the grant of a power of attorney by fraud,

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(1) 3 App. Cas. 459.

C. A. but he cannot steal a power of attorney. He cannot steal a contract; he can only steal a chattel. The particular transaction  
1910 here was, as I understand it, in substance, as follows. On  
WHITEHORN here was, as I understand it, in substance, as follows. On  
BROTHERS July 31, 1909, the plaintiffs, the owners of this necklace, sent it  
v. to Bruford on sale or return, and, upon the evidence, their  
DAVISON. intention appears to have been this: they were not intending to  
Buckley L.J. pass the property to him; but they were intending to hand him  
possession of the necklace, believing, by reason of what he falsely  
told them, that he had a customer who wanted to buy such a  
necklace, and they were giving him authority to hand over the  
necklace, and to pass the property in it, to that supposed  
customer. They were sending him the necklace on approbation,  
and making him this offer: "You may have possession of this  
article, and, if you are so minded, you may pass the property in  
it to the customer whom you tell us you have"; but there was  
no present passing of the property to him. It was therefore such  
a case as I have described as being one where the owner  
voluntarily parts with the possession of goods, and intends to  
confer a power to pass the property. That to my mind is not  
larceny by a trick, but is obtaining goods by false pretences.

But I will assume now that I am wrong as to this. The next material step is that, subsequently, there was a new transaction between the parties, and the way in which it came about was as follows. Bruford said that his customer was a very good customer, but he could not afford to press him for money; he could not insinuate that he could not let the customer have the necklace until he paid cash; and therefore he, Bruford, wished to have it on credit. The plaintiffs assented to that, and they ultimately sold him the necklace out and out upon the terms that he should give two bills for the price, one at five months and the other at six months. The position, therefore, is that, assuming that there was originally larceny by a trick, and that Bruford had stolen the necklace, he comes to the plaintiffs, who do not know that, and asks them to sell the necklace to him, and they accordingly do so, and he pays them the price by bills. After that, it appears to me immaterial for the present purpose whether he obtained possession of the goods originally by larceny or not. The defendant's title is obtained in this way. Upon the

hypothesis that the original transaction was a larceny, then, on August 5, when the necklace was pledged with him, he had no title to it at all. If Bruford had stolen it, he had that which is sometimes incorrectly called a void title, but which is really no title at all; Bruford could not then give the defendant a title. Upon this hypothesis the defendant on August 5 got no title, but afterwards, when Bruford became the owner of the necklace, and had the property in it, his title would go to feed the defendant's title; and as from that time it appears to me to be immaterial whether Bruford originally stole the necklace or not. From that time the defendant had a title. The subsequent transaction of sale to Bruford may have been, and I think it was, obtained by fraud, and, therefore, that which the defendant had then got was a title which would be voidable as against Bruford, his pledgor, and as against himself, if he was not a transferee for value in good faith and without notice. The whole question in this case, therefore, to my mind, resolves itself into this—whether there was or was not larceny by a trick, can the title which the defendant obtained be set aside at the suit of the plaintiffs except upon the ground that the defendant was not a transferee for value in good faith and without notice? By a “voidable title” is meant a title which, if the person entitled to avoid does not elect to avoid it, will be a good title. It is a good title until a person entitled to avoid elects to avoid it, and does avoid it, in which case that which was a title, though a voidable title, becomes an avoided title. Now, when a person comes to displace another from the enjoyment of property, which property is in him by virtue of a title, though a voidable title, I apprehend that, on every principle, it lies upon the plaintiff, who comes to displace that title, to prove all the material circumstances which go to shew that he is entitled to retake that property from the person who has got it. I will not elaborate that proposition, because I think that there is ample authority for it. I can see no ground for arguing the contrary except that afforded by the form of the language used in s. 23 of the Sale of Goods Act, 1893. I agree that that language does raise a question which is capable of argument. The words of the section are these: “When the seller of goods has a voidable

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C. A. title thereto, but his title has not been avoided at the time of  
1910 the sale, the buyer acquires a good title to the goods, provided  
WHITEHORN he buys them in good faith and without notice of the seller's  
BROTHERS defect of title." I agree that the fact that these latter words are  
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DAVISON. in the form of a proviso gives rise to an argument that, under  
Buckley L.J. the circumstances mentioned in the section, it is for the buyer to  
prove that he comes within them, and not for the person who is  
seeking to avoid his title to prove that he does not, but on  
consideration I have come to the conclusion that this is not the  
meaning of the section. I think it merely means that in the one  
event the buyer is to have a good title, and in the other event he  
is not to have a good title, and throws no light on the question  
upon whom the onus of proof lies. I think, therefore, that the  
onus was on the plaintiffs of shewing that the facts were such  
that they could avoid the good title which prima facie the  
defendant had got. If the defendant's title was voidable, it was  
for the plaintiffs to avoid it. That being so, and the onus,  
therefore, being upon the plaintiffs to prove that the defendant  
took otherwise than in good faith or with notice, I think myself  
that there was no evidence to support the answer given by the  
jury to the third question put to them. Under those circum-  
stances I think that the judgment below ought to be discharged  
and judgment ought to be entered for the defendant.

KENNEDY L.J. In this case I agree that the judgment given  
below cannot stand, but I am unable on the whole to come to  
the conclusion that we ought to enter judgment for the  
defendant. In my opinion there ought to be a new trial; but,  
as my brothers think otherwise, judgment will be entered for the  
defendant.

Many very interesting questions have been raised during the  
argument, the decision of which would, if there had been a new  
trial, have been very important as a guide to the judge at the  
trial in future, and as to which I desire to state my view. I  
need not recapitulate the general circumstances of the case.  
There is no dispute as to the fraudulent character of the trans-  
actions with regard to the necklace in question so far as Bruford  
is concerned. I will proceed to deal with the questions which

appear to me to arise upon those transactions in the order in which they were dealt with in the summing up of the learned judge.

The first question is, What was the nature in point of law and fact of the transaction into which Bruford entered with the plaintiffs in the first instance on July 31? The views which the plaintiffs on the one side and the defendant on the other put forward are, when contrasted together, respectively these. The plaintiffs say that they never then entered into a contract for sale of this necklace. We all know—and there is legislation on the subject—what is the nature of the ordinary transaction of sending goods on approbation, or on sale or return. What the plaintiffs say is that there was in this case, at the most, a contract of bailment, under which they delivered the necklace to Bruford with an opportunity of making a contract for sale of it, but only this contract, namely, a contract in which it was to be a condition precedent to the passing of the property from the plaintiffs that cash should be paid to the plaintiffs for the necklace. That is the plaintiffs' contention. The defendant's contention is that there was a contract of bailment with the opportunity of making a contract for sale of the necklace, and, therefore, passing the property in it, with a term that the buyer should pay net cash, a term on which, of course, he could be sued, if he did not comply with it, but the fulfilment of which was not a condition precedent to the passing of the property in the necklace. As to which of these two positions was the true one, I think the jury had to decide, subject, of course, to a proper direction by the judge. It is a somewhat startling suggestion that, without more explicit language in the contract or memorandum, there should be introduced so important a term as that the property should not pass unless and until cash was paid to the plaintiffs, but it was said at the trial that the recognized meaning of the words "net cash" in this trade was that the property should not pass unless upon a contract fulfilled by the actual payment of cash as a condition precedent to the passing of the property. I do not say that there was no evidence upon which the plaintiffs' view of the matter in this respect could properly be left to the jury; but, if it had been necessary

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to decide the case on this point, I should not, on a point so important with regard to the suggestion of larceny by trick, have been satisfied to leave the case where it stands upon the finding of the jury; because, with all respect to the learned judge, I think that the question which he put to the witness—namely, “Upon the terms upon which you parted with this necklace to Bruford would the property pass to Bruford without your receiving the cash?”—was not a right question to put, inasmuch as it was a question as to a consequence of law. A little later he put the question “Was it your intention that the property should pass to Bruford without receiving cash?” And to this the witness answered “Not without receiving the money.” I do not think myself that either of these were questions which ought to have been put, the first, as I have said, being a question as to whether the terms of the contract included a legal consequence, and the other being a question which asked the witness’s own intention in making the contract. The effect of a contract is to be inferred by the tribunal from the words used orally, or in writing if there is a written contract, construed with regard to the circumstances of the case. It is quite true that, as one would naturally expect, when the learned judge came to sum up, he distinctly explained to the jury that they must not regard the witness’s statement of his intention as at all conclusive, but I cannot help feeling that it might be difficult for the jury altogether to divest their minds of the effect produced upon them by the answers to those questions. I think that there might be a serious question whether there ought not to be a new trial on this point, if the finding of the jury upon it became material.

But then this further question arises. Assuming for this purpose that the plaintiffs’ contention is right, and that, according to the terms of the contract as understood by the jury, this was a bailment, or handing over of the necklace, on the terms that the property in it should not pass unless and until the plaintiffs received the price in cash, nevertheless, as it is quite clear that Bruford falsely represented to the plaintiffs that he was desirous of buying for the purpose of reselling to a customer, if the latter approved of the article, and that the

plaintiffs themselves gave to Bruford possession of the necklace upon that basis, it seems to me that, even upon the plaintiffs' own view of the transaction, it would not be right to describe it as amounting to larceny by a trick. I will not go in detail into the arguments, interesting though they are, as to what is larceny by a trick, and what merely amounts to obtaining a contract by fraud—I would not limit it to false pretences—but I hold the opinion which Channell J. elaborated in his judgment in the case of *Oppenheimer v. Frazer & Wyatt*. (1) I will not read what he there said, as I think it is under the circumstances of this case unnecessary to decide this point, but, if it were necessary to do so, I should concur in the view which he there expressed, especially at pp. 526, 527 of the report of his judgment in the *Law Reports*. I think that, for the purpose of testing the rights of third persons who may have honestly become transferees of goods in a case such as this between the time of the fraudulent transaction and the time when it is sought to be avoided by the person who has been defrauded, it is not right, even on the plaintiffs' view of the transaction, to treat it as larceny by a trick. With regard to larceny by a trick I do not desire to add anything to the statement of the law in the passage to which I referred in the same case in the Court of Appeal (2) from Pollock and Wright on Possession in the Common Law, pp. 218, 219. The matter is dealt with, and the legal principles involved are fully discussed, in that passage, and I am willing to adopt what is said there as an accurate expression of the law with regard to the question what constitutes larceny by a trick. I do not think that a case such as this, where, even on the plaintiffs' view, there was a bailment and delivery, and not that alone, but a bailment and delivery for the purpose of the person to whom the article was delivered himself exercising a disposing power over the property, can be properly described for the purposes of such an action as the present as larceny by a trick, resulting in a void, and not a merely voidable, contract. It was intended by the plaintiffs that Bruford should sell himself, as is shewn by many passages in the evidence for the plaintiffs. It seems to me impossible

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

(2) [1907] 2 K. B. 50, at p. 77.

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to say that this is a case in which there is no contract at all beyond a mere bailment: it was not a case of a mere bailment; not only was the possession parted with, but a right was also given to the bailee to confer the property in the article on a third person. I think, as I gather Channell J. thought, that where you have a case like *Hardman v. Booth* (1) or *Cundy v. Lindsay* (2), i.e., a case where, though there may be an apparent contract, there is no real contract as the result of the transaction, because there is no person with whom a contract is really made by the seller at all, in such a case the mere bailment of the goods with the consent of the owner does not prevent the transaction from being larceny by a trick; but, when the facts are such as I have described them in the present case, I think that there is no evidence to support a finding by the jury that there was larceny by a trick. But I think that, as has been pointed out, that finding becomes immaterial, having regard to what subsequently happened. I agree that the fraud of Bruford continued and that the subsequent transaction of sale was induced by that fraud, inasmuch as the plaintiffs were still told by him that he had a customer, who was going to pay for the necklace, and that it was for the customer's convenience that cash was not to be paid; and therefore that transaction was voidable on the ground of fraud. But that second transaction was unquestionably a sale, as appears clearly from the plaintiffs' books, and from the fact that they took bills for the price of the necklace. It is quite impossible on the evidence to say that that transaction did not amount to a sale, though I agree that it was a sale induced by the fraud of Bruford, and therefore voidable as against him. It was, subject to the right of the plaintiffs to cancel or avoid it as against him by reason of its being induced by fraud, a sale to Bruford, which gave him all the rights of a purchaser, and the benefit of which would, as it seems to me, enure to any innocent purchaser to whom Bruford, at any date prior to the plaintiffs' electing to avoid it, might transfer the necklace. I cannot find in the summing up any reference to the effect upon the rights of the parties of this very important transaction, by which the plaintiffs sold the necklace to Bruford

(1) (1863) 1 H. &amp; C. 803.

(2) 3 App. Cas. 459.



and took payment in bills for the price ; and I do not under these circumstances feel satisfied that the jury came to a right conclusion on the case, or that the questions left to them were sufficient to determine it.

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The question remains as to the onus of proof and the effect of the Sale of Goods Act, 1893, s. 23. It was assumed, I think, in the last judgment that that section applies to this case. I feel by no means sure that it does. So much the worse for the plaintiffs, if it does not, because then we are thrown back on the common law, and in that case the difficulty which depends upon the words in question being in the form of a proviso does not arise. The section in terms deals with the case of a "buyer" acquiring a title to goods, and it may be that the case of a pledgee might be different. It is not necessary to decide that question, but the inclination of my mind is to say that the present case depends upon the common law ; and, if so, I think the true rule of the common law as regards burden of proof in a case of this kind is that a plaintiff, who comes forward to deprive another of his title to property that has been acquired by him before the plaintiff has elected to avoid the transaction out of which that title has arisen, is bound to shew, not only that he himself was originally induced to part with his property by fraud, but also that he is entitled to deprive the defendant of it by proving that he took it otherwise than in good faith or with notice. No authority directly in point has been cited one way or the other. It seems to me that a plaintiff who seeks to avoid the title of a third party in such a case as this must be dealt with upon the basis that prima facie the act of the third party is that of an innocent person, and that he cannot be deprived of that which he has acquired, and must be assumed, in the absence of evidence, to have innocently acquired, without proof that there are circumstances which put him out of the category of an innocent buyer and into that of one who could not have acted honestly in the transaction. I agree with the other members of the Court that the summing up was in this respect materially wrong. Reference has been made on this point to the cases and the law with regard to bills of exchange. It is sufficient for me to say that the question on whom the onus of proof lay in the case of

C. A. a bill of exchange was the subject of disagreement among  
1910 judges before the Bills of Exchange Act, 1882, as was men-  
WHITEHORN tioned by Lord Blackburn in *Jones v. Gordon*. (1) The law as  
BROTHERS regards that question has now been settled by s. 30 of the Bills  
v. of Exchange Act, 1882. It seems to me that, in point of  
DAVISON. principle, there being no authority to the contrary, the correct  
Kennedy L.J. view is that the onus of proof in this case lay on the plaintiffs,  
and I cannot therefore, with respect to my brother Bray, concur  
with the view which he expressed. If the onus of proof was  
on the plaintiffs, it is quite clear that the finding of the jury on  
this question cannot stand, because the learned judge directed  
them that the defendant had got to make out affirmatively that  
he had acted in the transaction in good faith and without notice.

The one thing upon which I cannot go the full length with  
my brothers in this Court is this. I am very far from saying  
that, upon the evidence as it stands, I should have come  
to the conclusion that, if the onus lay upon the plaintiffs,  
the defendant's servant was shewn to have been guilty of  
any bad faith or want of regard for facts which he must have  
noticed, and which ought to have put him on inquiry; but it  
is not for me, as I conceive, to put myself in the place of  
the jury, and, unless it can be said that there was really no  
evidence in the case on this question for the consideration of the  
jury upon a proper direction by the judge, I do not think that the  
Court is justified in entering judgment for the defendant. Upon  
the whole, without going into details, I think that there were  
circumstances in the case, putting it generally, such as rendered  
it one which a judge would not have been justified in withdrawing  
from the jury. I think that my judgment is entirely in accord-  
ance with the judgment of the other members of the Court on all  
the other points, but I do not myself think that the application  
ought to result in anything more than a new trial. The  
judgment of the Court, however, is to the contrary.

*Judgment for defendant.*

Solicitor for plaintiffs: *Julius A. White.*

Solicitor for defendant: *Stanley J. Attenborough.*

E. L.